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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

ROD D. LEGGAT,

Appellant,

vs.

CHARLES D. McLURE,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the  
District of Montana.

Filed

APR - 4 1916

F. D. Monckton,  
Clerk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

ROD D. LEGGAT,

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vs.

CHARLES D. McLURE,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**[1\*] Names and Addresses of Solicitors of Record.**

Messrs. MAURY TEMPLEMAN & DAVIES,  
of Butte, Montana,

Messrs. GUNN, RASCH & HALL, of Helena,  
Montana,

Solicitors for Plaintiff and Appellee.

Messrs. NOLAN & DONOVAN, of Butte, Mon-  
tana,

WILLIAM SCALLON, Esq., of Helena, Mon-  
tana,

Solicitors for Defendant and Appellant.

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**[2]** *In the District Court of the United States, in  
and for the District of Montana.*

No. 22—IN EQUITY.

CHARLES D. McLURE,

Plaintiff,

vs.

ROD D. LEGGAT,

Defendant.

BE IT REMEMBERED, that on April 7, 1915, the  
plaintiff filed his bill of complaint herein in the words  
and figures following, to wit:

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\*Page-number appearing at top of page of original certified Record.

[3] *In the District Court of the United States, in  
and for the District of Montana.*

In EQUITY.

CHARLES D. McLURE,

Complainant,

vs.

ROD D. LEGGAT,

Defendant.

**Bill of Complaint.**

To the Honorable, the Judges of the Above-entitled  
Court, and the Court:

Your orator a citizen of the State of Missouri, brings this bill of complaint in equity against the defendant, a citizen of Montana, and for a cause of action where the amount involved is more than three thousand (\$3,000) dollars, and thereupon your orator complaining, alleges:

1. That Charles D. McLure, the complainant, at all times hereinafter mentioned was and now is a citizen of the State of Missouri.

2. That Rod D. Leggat at all times hereinafter mentioned was and now is a citizen of the State of Montana.

3. That the amount involved in this suit in equity, exclusive of interest and costs, is more than the sum of three thousand (\$3,000) dollars, to wit, it is more than [4] the sum of one hundred and forty-eight thousand (\$148,000) dollars.

4. And further your orator alleges: That on the 18th day of April, 1913, your orator was seized as



of his own demesne in fee simple absolute of all of the following described property situate in Silver Bow County in Montana, and in the district aforesaid.

An undivided three-fourths ( $\frac{3}{4}$ ths) interest of, in and to the Eastern quartz lode mining claim, Survey No. 1230, and patented;

An undivided three eighths ( $\frac{3}{8}$ ths) interest in and to the Ouichita quartz lode mining claim, Survey No. 1229, and patented.

An undivided one-half ( $\frac{1}{2}$ ) interest in the Elvina quartz lode mining claim, Lot No. 258;

And an undivided one-sixth ( $\frac{1}{6}$ th) interest in the Bland quartz lode mining claim, Survey No. 1160.

5. Your orator further alleges: That on the 18th day of April, 1913, a certain judgment was rendered and entered by the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow against your orator, and in favor of Ira T. Wight and others, and execution was issued thereon on the 14th day of May, 1913, for the sum of \$964.65 and no greater sum; that the said execution was placed in the hands of the sheriff of Silver Bow County by the plaintiff Ira T. Wight and his coplaintiff therein, and [5] the said sheriff levied upon and seized all of your orator's right, title and interest in the above-described real property, which consists of four separate and distinct parcels of land, and all of the said property was under the said judgment and execution advertised by the sheriff of Silver Bow County for sale to be had on June 6th, 1913.

6. That at all times between the first day of January, 1913, and the present day, the said above-described interests of your orator in the said four patented mining claims at all times was and is now of the reasonable market value and price of one hundred and fifty thousand (\$150,000) dollars and more.

7. That there had existed between your orator and the defendant during a period of thirty years a warm friendship, confidence and mutual trust; that your orator and the defendant had been repeatedly during the said thirty years engaged as copartners in many mining ventures and the operation of many mines, and the buying and selling of mines together as joint owners, tenants in common, and at the time of the sale hereinafter set forth, the defendant was a co-owner in each and all of the said four patented mining claims with your orator, to wit, he owned an undivided interest in the Eastern different from the three-fourths interest of your orator; he owned an undivided interest in the Ouichita different from the [6] three-eighths interest of your orator; he owned an undivided interest in the Bland different from the one-sixth interest of your orator; he owned the other one-half interest in the Elvina beside the one-half owned by your orator.

8. And on the said 6th day of June, 1913, while your orator had great and valuable mining properties, the titles to which were otherwise clear save and except for the said judgment, yet your orator had no cash on hand, and on the said day he requested the defendant to become a purchaser at the

said sale and to hold the title, if any were subsequently obtained by the defendant, as a mortgage to secure the amount that might be bid by the defendant at the said sale in payment and satisfaction of the judgment and execution issued against your orator in the suit of Ira T. Wight and others versus your orator, and the said defendant agreed with your orator that he would bid an amount equal to the judgment as to principal, interest and accruing costs and expenses of sale when the sheriff should offer the said real property above described for sale at the said time, and your orator, with the defendant, pursuant to the said agreement, appeared at the said sale, and the defendant did bid pursuant to his agreement with your orator to hold the said title as security for his bid, the sum of one thousand and four and 15/100 (\$1004.15) dollars, and no greater sum; and thereafter, [7] at many times between the 6th day of June, 1913, and the period of redemption of one year allowed by law and statutes in Montana, your orator was able to redeem the said above-described property, and was willing to do so, and signified his intention and desire to do so to the defendant; that the defendant informed your orator repeatedly that after the period of one year might expire, provided there were no redemption, he would hold any title that might be obtained by reason of the expiration of time merely as a mortgage to secure the repayment from your orator of the sum of one thousand and four and 15/100 (\$1,004.15) dollars, and interest thereon at the rate of eight per cent per annum from the 6th day of June,

1913, until the same should be repaid, and promised and agreed with your orator, before the expiration of the said period of redemption, to wit, June 6, 1914, that if your orator at any time after the said 6th day of June, 1914, would repay to the defendant the sum of one thousand and four and 15/100 (\$1,004.15) dollars, together with interest at the rate of eight per cent per annum, he would reconvey to your orator all of the real property of your orator hereinbefore set forth and described. Your orator relied upon the said promise and agreement, and due to such reliance upon such agreement, and the trust and confidence reposed by your orator in the said defendant, the said trust, nurtured and raised up by thirty years of intimate acquaintance and [8] business dealings, and copartnerships in mining ventures, and in the owning of mining properties, and for no other reason, your orator allowed the period of redemption, to wit, one year from the 6th day of June, 1913, to expire without effecting a redemption of any of the property hereinbefore described.

8-A. That on the 10th day of August, 1912, the plaintiff loaned to the defendant five hundred (\$500) dollars, money of the United States; that until the 6th day of June, 1913, the time of the said sale, no part of the same had ever been repaid by the defendant to the plaintiff, and all of the same was entirely due, owing and unpaid, so that the actual consideration of the said bid and the said sheriff's certificate of sale to the defendant R. D. Leggat was only the sum of five hundred and four and 15/100 (\$504.15)



dollars. The plaintiff waives interest on his said loan of five hundred (\$500) dollars to the defendant from August 10, 1912, to June 6, 1913, for that there was no understanding as to interest, and none was expected.

9. That on the 6th day of April, 1915, your orator offered to repay to the defendant the sum of one thousand and four and  $15/100$  (\$1,004.15) dollars, together with interest thereon at the rate of eight per cent per annum from June the 6th day, 1913, and requested and demanded of the defendant that he reconvey to your orator the said three-fourths interest in the Eastern lode claim; the said three-eighths interest in the Ouchita lode claim; the said one-sixth interest in the Bland lode claim; and the said one-half interest in the Elvina lode claim; and your orator was able, ready and willing to pay to the defendant the said sum of money with the interest thereon; that the defendant refused to accept the said money, and the defendant refused to reconvey to your orator any of the said lands herein described or any part thereof.

10. That your orator is now ready, willing and able, and hereby offers to pay to the defendant, the sum of one thousand and four and  $15/100$  (\$1,004.15) dollars, and also the interest thereon at the rate of eight per cent per annum from the 6th day of June, 1913, until this day, [9] the 7th day of April, 1915, provided the defendant will reconvey to your orator your orator's property as hereinabove described.

11. That the sheriff of Silver Bow County, at the request of the defendant, on the 11th day of June,

1914, made, executed and delivered to the defendant a deed, a copy of which said deed is hereunto annexed and marked exhibit "A"; that the consideration for the said deed is wholly and grossly inadequate, and in great disparity with the actual value of the property described therein, and the said deed was obtained by reason of the trust reposed in the promise and agreement of the defendant made to your orator to reconvey at any time to your orator the said lands upon payment of the said amount of money; that if the said deed be allowed to stand upon the records of Silver Bow County, Montana, where the same has been recorded, it constitutes a cloud upon the title of the said lands herein described, which should in equity and good conscience be the property of your orator upon the payment of the said sum of money with the interest thereon.

12. That the said property and all of the same, though consisting of four separate and distinct parcels of land, and your orator's interest in any one piece would have brought, had your orator sought bidders, the amount of the said judgment of Ira T. Wight, yet all of the same was sold in one parcel, and so that nothing like their full value could be realized; that there were no bidders [10] present at the said sale but the defendant, and no other persons present but your orator, the defendant, the sheriff or his deputy, and one of the plaintiffs.

13. That your orator is a man very much advanced in years, to wit, of approximately the age of seventy (70) years, and during the last two years has suffered much from failing health and sickness.

WHEREFORE your orator prays that the Court and the Judges thereof issue a subpoena to the defendant compelling him to set forth in the answer—an answer under oath being hereby specifically waived—by what right he claims any of the property hereinbefore described; that he be required upon

Hundred Five  
(\$504.15)  
the payment to him of the said sum of ~~one~~ G. W. S.  
~~thousand~~ and four and 15/100 ~~(\$1,004.15)~~ G. W. S.  
dollars, and such interest as has grown and

may grow thereon at the rate of eight per cent per annum from June 6, 1913, to make, execute and deliver a deed to the said interests in lands hereinbefore described; that he be thereafter enjoined from ever asserting any title to any of the same, and that your orator recover his costs against the defendant; and for such other and further relief as to the Court may seem meet and equitable.

MAURY, TEMPLEMAN & DAVIES,  
Solicitors for the Complainant.

[11] District of Montana,  
County of Silver Bow,—ss.

Lowndes Maury, being first duly sworn on his oath, does say: That he is one of the solicitors for Charles D. McLure, the complainant in the foregoing bill of complaint mentioned; that he makes this verification on behalf of the said Charles D. McLure for the reason that the said Charles D. McLure is now absent from the district of Montana, wherein resides the said affiant; that the foregoing bill of complaint

is true to the best of affiant's knowledge, information and belief.

LOWNDES MAURY.

Subscribed and sworn to before me this 7th day of April, 1915.

[N. S.]

W. D. KYLE,

Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires May 16, 1917.

**[12] [Exhibit "A"—Sheriff's Deed Under Execution.]**

THIS INDENTURE, made the 10th day of June, in the year of our Lord, 1914, between Tim Driscoll, sheriff of the county of Silver Bow, State of Montana, the party of the first part, and Rod D. Leggat, of the said county of Silver Bow, of the party of the second part.

Whereas, by virtue of writ of execution issued out of and under the seal of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, tested the 14th day of May, A. D. 1913, upon a judgment recovered in the said court, on the 18th day of April, A. D. 1913, in favor of Ira T. Wight et al., and against Chas. D. McLure to the said sheriff directed and delivered, commanding him that, out of personal property of said judgment debtor in his county, he should cause to be made certain moneys in the writ specified, and if sufficient property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real prop-



erty belonging to said judgment debtor, on the 6th day of June, A. D. 1913, or at any time afterwards; and whereas, because sufficient personal property of the said judgment debtor could not be found, whereof said sheriff could cause to be made the moneys specified in said writ, the said sheriff did, in obedience to said command, levy on, take, and seize all the [13] right, title, interest and claim which said judgment debtor so had in and to the lands, tenements, real estate, and premises hereinafter particularly set forth and described with the appurtenances, and did on the 6th day of June, A. D. 1914, sell all the right, title, interest and claim of the said judgment debtor in and to the said premises at public auction in front of the courthouse in the city of Butte, in said county of Silver Bow, between the hours of nine in the morning and five in the afternoon of that day, namely, at ten o'clock A. M., after having first given due notice of the time and place of such sale, by publication, according to the law, at which sale all the rights, title, interest and claim of said judgment debtor in and to the said premises were struck off and sold to the said party of the second part for the sum of one thousand and four and 15/100 dollars, legal money of the United States of America, the said party of the second part being the highest bidder, and that being the highest sum bid for the same, whereupon the said sheriff, after receiving from the said purchaser the said sum of money so bid as aforesaid, gave to the said party of the second part, such certificate of said sale as is by the law directed to be given, and a duplicate of such

certificate so duly filed by said sheriff in the office of the recorder of the county of Silver Bow; and whereas, twelve months after said sale had expired, without any redemption [14] of the said premises having been made.

NOW THIS INDENTURE WITNESSES, That the said Tim Driscoll, the sheriff aforesaid, by virtue of said writ, and in pursuance of the said statute in such cases made and provided, for and in consideration of the said sum of money, to him in hand paid as aforesaid by the said party of the second part, receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said party of the second part, and of his heirs and assigns, forever, all the right, title, interest and claim which the said judgment debtor Chas. D. McLure, had on the 6th day of June, A. D. 1913, or at any time afterwards, or now has in and to that certain lot, piece or parcel of land, situate, lying and being in the city of Butte, county of Silver Bow, State of Montana, and bounded and described as follows, to wit:

The *Elunia* quartz lode mining claim, situated in Silver Bow County, Montana, Lot No. 258, situated in Section one and two, Township 3 North, Range 8 West in Silver Bow County, Montana, patent for said mining claim being of record in Book A of U. S. patents at page 309.

The Eastern quartz lode mining claim, Survey No. 1230, The Bland quartz lode mining claim, Survey

No. 1160. The Ouichita quartz lode mining claim, Survey No. 1229, all in Silver Bow County, State of Montana.

[15] Together with all and singular, the hereditaments and appurtenances thereto belonging or in anywise appertaining, to have and to hold said premises with the appurtenances, unto the said party of the second part, his heirs and assigns, forever, as fully and absolutely as the said sheriff can, may, or ought to, by virtue of said writ and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same.

IN WITNESS WHEREOF, the said sheriff, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

TIM DRISCOLL,

Sheriff of the County of Silver Bow.

Signed, sealed and delivered in the presence of

HUGH LYNCH.

ANDREW QUILTY.

[16] State of Montana,  
County of Silver Bow,—ss.

On this 11th day of June, 1914, before me, W. P. McCarty, a notary public in and for the State of Montana, personally appeared Tim Driscoll, sheriff of the county of Silver Bow, State of Montana, to me known to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that as such sheriff he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year

in this certificate above written.

W. P. McCARTY,  
Notary Public in and for the State of Montana, Re-  
siding at Butte, Montana.

My commission expires Nov. 12, 1915.

Filed for record June 11, A. D. 1914, at six min-  
utes past four o'clock P. M.

DAVE KEHOE,  
County Recorder.  
By A. Lavelle,  
Deputy.

(Book 113, page 379.)

Filed April 7, 1915. Geo. W. Sproule, Clerk.

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[17] Thereafter, on May 15, 1915, defendant filed  
his answer herein in the words and figures following,  
to wit:

[18] *In the District Court of the United States, in  
and for the District of Montana.*

IN EQUITY.

CHARLES D. McLURE,

Plaintiff,

vs.

ROD D. LEGGAT,

Defendant.

**Answer.**

COMES NOW the defendant and as to the allega-  
tions of paragraph one of said bill alleges that he is  
without knowledge. Defendant admits the allega-  
tions of paragraphs two and three of said bill, ex-



cept the allegation in paragraph three of said bill that the property in controversy is worth \$148,000 and, as to said statement, defendant alleges that the value thereof is more than \$3,000, that the said property is mining property and speculative in its nature and that defendant does not know the value thereof.

Defendant admits the allegations of paragraph four of said bill. Defendant alleges, however, that, as to the allegation that plaintiff was on the 18th day of April, 1913, seized in fee simple absolute of an undivided one-half interest in the Elvina Quartz Lode Mining Claim, Lot No. 258, on the 18th day of April, 1913, long prior thereto and thereafter, up to June 6, 1913, the [19] title to the whole interest in said quartz lode mining claim stood in the name of said plaintiff, but that during all of said times the defendant was the owner of the beneficial interest in an undivided one-half thereof.

Defendant denies that on the 18th day of April, 1913, a judgment was rendered and entered by the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, against the plaintiff and in favor of Ira T. Wight and others, and that execution was issued thereon from said court on the 14th day of May, 1913, for the sum of \$964.65. Defendant alleges the fact to be that the said judgment for said sum was made, given and entered in the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark against plaintiff and in favor of Ira T. Wight and others for the sum of

\$964.65. Defendant admits that execution was issued upon the the judgment made, given and entered in the said First Judicial District, and placed in the hands of the sheriff of Silver Bow County by the said Ira T. Wight and his coplaintiff, and admits that the sheriff under and by virtue of said execution seized all of the right, title and interest of the plaintiff in and to the Eastern quartz lode mining claim, Survey No. 1230; Ouichita quartz lode mining claim, Survey No. 1229; the Elvina quartz lode mining claim, Lot No. 258; the Bland quartz lode mining claim, Survey No. 1160; and admits that [20] all of the said property was advertised by the sheriff of said Silver Bow County for sale to be had on June 6th, 1913.

As to the allegations of paragraph six of said bill, defendant alleges that he is without knowledge as to whether or not the reasonable market value of the interests in said four patented mining claims, alleged to be the property of the plaintiff, was at all times between the first day of January, 1913, and April 7, 1915, of the reasonable market value of \$150,000 and more. But defendant alleges that the value thereof is speculative and that the said interests have no reasonable market value.

Defendant denies that during a period of thirty years a warm friendship, confidence and mutual trust existed between plaintiff and defendant. Defendant alleges that no copartnership has existed between plaintiff and defendant for more than twenty-five years last past. Defendant admits that, together with plaintiff, he has been an owner in mining

claims as tenant in common with plaintiff. Defendant denies that on the 6th day of June, 1913, he was a co-owner with plaintiff in the Eastern, Ouichita or Bland mining claims; and, as to the Elvina lode claim, defendant alleges that on the 6th day of June, 1913, the title to said claim stood upon the records of Silver Bow County, Montana, in the name of plaintiff; that defendant was the owner of an undivided one-half of the [21] beneficial interest thereof.

Defendant admits that on the 6th day of June, 1913, the title of plaintiff was clear save and except for the said judgment of Ira T. Wight and another against plaintiff. Defendant alleges the fact to be that, between the 6th day of June, 1913, and the 6th day of June, 1914, to wit, on May 29, 1914, the title of the said plaintiff in and to said mining claims was encumbered by an attachment lien in a suit commenced in the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County, on June 16, 1913, by James A. Murray against the plaintiff, for the sum of \$2,100 principal with interest thereon from the 2d day of March, 1911, for an attorney's fee of \$300, and for costs of suit; and that the said interests were also encumbered on June 4, 1914, by an attachment lien in a suit in said last-named District Court, wherein the Hennessy Company, a corporation, was plaintiff, and this plaintiff was defendant, for the sum of \$1,462.12, together with interest thereon at the rate of eight per cent per annum from the 30th day of August, 1913, and for costs of suit. As to whether or not, upon



June 6th, 1913, plaintiff had no cash on hand, as he alleges, defendant alleges that he is without knowledge.

Defendant denies that plaintiff requested him to become a purchaser at said execution sale on June 6, 1913, and to hold the title, if any were subsequently obtained [22] by the defendant, as a mortgage to secure the amount that might be bid by the defendant at the said sale in payment and satisfaction of the judgment and execution issued against plaintiff in the suit of Ira T. Wight and another against plaintiff; and defendant denies that he agreed with plaintiff that he would bid an amount equal to the judgment as to principal, interest and accruing costs and expenses of sale, when the sheriff should offer the said real property above described for sale on June 6th, 1914, and denies that he had any agreement to appear at said sale for plaintiff, and denies that he purchased at said sale for the plaintiff, and denies that he agreed to hold the title acquired at said sale by him as a mortgage or for any other purpose in which the said plaintiff had any interest. Defendant alleges the fact to be that he purchased at said sale for his own right and account only. Defendant denies that the plaintiff appeared at said execution sale. Defendant alleges that the said plaintiff was not present at said sale. Defendant denies that he bid the sum of \$1,004.15, or any other sum, at said sale under an agreement with plaintiff to hold the title obtained by said purchase as security for the sum so bid by defendant, or for any other sum.



Defendant denies that at any time between the 6th day of June, 1913, and the period of redemption of one year allowed by law and statutes of Montana, to wit, June [23] 6, 1914, plaintiff signified to defendant his intention and desire to redeem said property. As to whether or not, during the said year of redemption, plaintiff was able to redeem the above-described property, defendant alleges that he is without knowledge. Defendant denies that he informed plaintiff repeatedly, or at all, that, after the period of redemption might expire, provided there was no redemption, he, defendant, would hold any title that might be obtained by reason of the expiration of time merely as a mortgage to secure the redemption of the sum of \$1,004.15, with interest thereon at the rate of eight per cent per annum, from the 6th day of June, 1913, until the same should be repaid.

Defendant denies that he promised and agreed with plaintiff, before the expiration of said period of redemption, to wit, June 6, 1914, or at all, that if plaintiff at any time after the said 6th day of June, 1914, would repay to defendant the sum of \$1,004.15, together with interest at the rate of eight per cent per annum, he would reconvey to plaintiff all of the real property purchased at said sale, or any portion thereof, or at all. Defendant denies that the plaintiff permitted the period of redemption to expire by reason of any promise and agreement or conduct of defendant.

Defendant denies that plaintiff on April 6th, 1915, [24] or at any other time, offered to repay defend-

ant the sum of \$1,004.15, together with interest at the rate of eight per cent per annum from June 6, 1913, or any other sum. Defendant admits that plaintiff requested and demanded of him that he convey to plaintiff the interest in said mining claims set forth and described in paragraph nine of his complaint. As to whether plaintiff was able, ready or willing to pay defendant the said sum of money with interest thereon, defendant alleges that he is without knowledge. Defendant admits that he refused to reconvey to plaintiff any of the lands described in the complaint.

Defendant admits, as alleged in paragraph eleven of said bill, that the sheriff of Silver Bow County, Montana, made, executed and delivered to defendant, on June 11, 1914, a sheriff's deed, a true copy of which is annexed to plaintiff's bill and marked exhibit "A." Defendant denies that the consideration for the said deed is wholly and grossly inadequate, and denies that said deed was obtained by reason of a violation of any trust or promise or agreement made by the defendant to the plaintiff to reconvey, or that the said deed was obtained by defendant by reason of the violation of any other trust, promise or agreement made by defendant to plaintiff. Defendant admits that the sum paid by him upon execution is less than the value of the property obtained at said sale.

[25] As to the allegations of paragraph twelve that, had plaintiff sought bidders, the sale of said interests

would have brought more than the amount of judgment for which the same were sold to defendant, defendant alleges that he is without knowledge. Defendant denies that the plaintiff was present at said sale, admits that one of the plaintiffs, Ira T. Wight, was present, and that several other persons, the exact number of which defendant does not recollect, were present.

As to the allegations of paragraph thirteen, defendant admits that plaintiff is approximately of the age of seventy years, and that during the past two years he has been ill, but the defendant alleges that said illness has not, to the knowledge of defendant, incapacitated plaintiff from transacting business or attending to his own affairs.

WHEREFORE, defendant prays that the plaintiff take nothing by his said action, and that he may have his costs herein expended.

LOUIS P. DONOVAN,  
TIMOTHY F. NOLAN,  
Solicitors for Defendant.

Service of the foregoing answer admitted and copy thereof received this 15th day of May, 1915.

MAURY, TEMPLEMAN & DAVIES,  
Solicitors for Plaintiff.

Filed May 15, 1915. Geo. W. Sproule, Clerk.

[26] Thereafter, on —, 1915, plaintiff filed an amendment to his bill of complaint herein in the words and figures following, to wit:

(This amendment has been inserted in the bill.)

[27] *In the District Court of the United States, in  
and for the District of Montana.*

CHARLES D. McLURE,

Plaintiff,

vs.

ROD D. LEGGAT,

Defendant.

**Amendment to Bill of Complaint.**

“That on the 10th day of August, 1912, the plaintiff loaned to the defendant five hundred (\$500) dollars, money of the United States; that until the 6th day of June, 1913, the time of the said sale, no part of the same had ever been repaid by the defendant to the plaintiff, and all of the same was entirely due, owing and unpaid, so that the actual consideration of the said bid and the said sheriff’s certificate of sale to the defendant R. D. Leggat was only the sum of five hundred and four and 15/100 (\$504.15) dollars. The plaintiff waives interest on his said loan of five hundred (\$500) dollars to the defendant from August 10, 1912, to June 6, 1913, for that there was no understanding as to interest, and none was expected.”

Prayer amended by inserting therein five hundred and four and 15/100 (\$504.15) dollars, instead of one



thousand and four and 15/100 (\$1,004.15) dollars.

MAURY, TEMPLEMAN & DAVIES,  
Solicitors for the Plaintiff.

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[28] Thereafter, on Dec. 16, 1915, supplemental answer was filed by defendant herein, in the words and figures following, to wit:

[29] *In the District Court of the United States, in  
and for the District of Montana.*

CHARLES D. McLURE,

Plaintiff,

vs.

ROD D. LEGGAT,

Defendant.

**Supplemental Answer.**

COMES NOW the defendant, and for answer to the amendment to the bill, inserted therein as paragraph 8-a, and leave of Court being first had and obtained, says:

Admits that on the 10th day of August, 1912, plaintiff loaned to the defendant five hundred dollars, and alleges the fact to be that at the time of said loan there was due to the defendant from the plaintiff a sum in excess of five hundred dollars, to wit, for money laid out and expended by the defendant for the plaintiff, at the latter's request, the sum of either three hundred and twenty (\$320) dollars or three hundred and thirty (\$330) dollars. That on or about 1906 or 1907, defendant sent to the plaintiff

from Butte, Montana, to St. Louis, Missouri, five hundred (500) shares of the capital stock of a Montana corporation called the Combination Mining & Milling Company, which shares were then of the reasonable value of two hundred and fifty (\$250) dollars; that the same were retained by the plaintiff, and that ever since the said plaintiff has deprived the defendant of the possession thereof, and plaintiff alleges on his information and belief that the same were transferred on the books of the said company by the plaintiff to his own name, and ever since [30] have stood, and now stand, upon the books of said company as the property of plaintiff, and that the defendant has been deprived of the same.

L. P. DONOVAN,

T. F. NOLAN,

WM. SCALLON,

Solicitors for Defendant.

Service of the foregoing supplemental answer admitted and copy thereof received this 15 day of December, 1915.

MAURY, TEMPLEMAN & DAVIES,

Solicitors for Plaintiff.

Filed Dec. 16, 1915. Geo. W. Sproule, Clerk.

[31] Thereafter, on Jan. 22, 1916, the Memo. Decision of the Court was duly filed herein, in the words and figures following, to wit:

[32] [Memorandum Opinion.]

*United States District Court, Montana.*

CHARLES D. McCLURE,

vs.

ROD D. LEGGAT

Herein, the Court finds:

That all the allegations of the complaint are true; that all the allegations of the answer of the nature of counterclaim are true. And therefrom the Court concludes that plaintiff is entitled to recover of and from the defendant the interest in the mining claims set out in the complaint and claimed by him, and \$500 with legal interest from and after August 10, 1912, and costs; that defendant is entitled to recover of and from the plaintiff \$250 and legal interest for 10 years; \$70 and legal interest for 8 years; \$130 and legal interest for 7 years; \$50 and legal interest for 4 years; \$70 and legal interest for 4 years; \$1,004.15 and legal interest from June 6, 1913, to April 7, 1915. An appropriate decree will be entered. Thirty days for plaintiff to pay and defendant to deed.

(Signed) BOURQUIN, J.

MEMO.

The title to the property was in plaintiff, but he

held 1½ of the Elvina in trust for defendant. The property was and is worth above \$100,000. A year previous to the sheriff's sale involved it had been optioned for more than that, and perhaps was subject to the option at the time of the sale. Defendant agreed to bid in the property for the amount of the judgment against plaintiff, less than \$1,000, and hold it until plaintiff redeemed. He did so bid it in. [33] Plaintiff was led to believe, by defendant, that he need not redeem within the time fixed by statute in conventional cases, and he relied thereon and acted accordingly. The statutory time expired, and thereupon defendant claimed the property was his and refused redemption.

Very intimate and confidential relations had existed between the parties for 30 years.

No discussion of legal principles is necessary, further than to say that where the purchaser at sheriff's sale leads the judgment debtor to believe he can redeem after the statutory time runs and thus causes him to fail to redeem before the statute runs, the purchaser waives the time and the debtor can redeem within a reasonable time after the statute runs.

Schrader Case, 161 U. S. 344.

132 N. W. 435.

56 N. E. 786.

62 S. W. 1028.

93 Pac. 110.

The plainest principle of justice dictates the judgment. Equity always interferes to undo the wrong committed, in cases like unto this. Plaintiff is entitled to a reconveyance on reimbursing defendant



for his outlay. No exception was taken to the irregularity of the counterclaims put forward by defendant, so they are allowed. Within 30 days plaintiff will pay the amount found due to defendant, and concurrently therewith defendant will deliver a deed of the property to plaintiff.

(Signed) BOURQUIN, J.

Filed Jan. 22, 1916. Geo. W. Sproule, Clerk.

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[34] Thereafter, on Fem. 8, 1916, Decree was duly signed and entered herein, in the words and figures following, to wit:

[35] *In the District Court of the United States, in and for the District of Montana.*

No. 22—IN EQUITY.

CHARLES D. McLURE,

Complainant,

vs.

ROD D. LEGGAT,

Defendant.

**Decree.**

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

“Herein, the Court finds:

That all the allegations of the complaint are true; that all the allegations of the answer of the nature of counterclaim are true. And therefrom the Court concludes that plaintiff is entitled to recover of and

from the defendant the interests in the mining claims set out in the complaint and claimed by him, and \$500 with legal interest from and after August 10, 1912, and costs; that defendant is entitled to recover of and from the plaintiff \$250 and legal interest for 10 years; \$70 and legal interest for 8 years; \$130 and legal interest for 7 years; \$50 and legal interest for 4 years; \$70 and legal interest for 4 years; \$1,004.15 and legal interest from June 6, 1913, to April 7, 1915. An appropriate decree will be entered. Thirty days for plaintiff to pay and defendant to deed.

(Signed) BOURQUIN, J."

[36] WHEREFORE, it is ordered, adjudged and decreed that Charles D. McClure upon payment of the sum of \$1,440 to Rod D. Leggat within thirty days from January 22, 1916, or upon tender of the said amount to his solicitors of record within the said time; and, in case of refusal of acceptance by them, deposit of the same with the clerk of this court for the credit of Rod D. Leggat, is the owner of, and entitled to, the immediate possession of an undivided three-fourths ( $\frac{3}{4}$ ) interest of, in and to the Eastern quartz lode mining claim, Survey No. 1230, patented; an undivided three-eighths ( $\frac{3}{8}$ ) interest in and to the Ouichita quartz lode mining claim, Survey No. 1229, patented; an undivided one-sixth ( $\frac{1}{6}$ ) interest in and to the Bland quartz lode mining claim, Survey No. 1160; an undivided one-half ( $\frac{1}{2}$ ) interest in and to the Elvina quartz lode mining claim, Lot No. 258, all in Summit Valley Mining District, in Silver Bow County, in Montana.

Together with the tenements and appurtenances.

And upon such payment being made, or such tender and deposit being made, it is ordered, adjudged and decreed that Rod D. Leggat within thirty days from the 22d day of January, 1916, make, execute and deliver a good and sufficient deed, containing the words: "grant, bargain and sell unto Charles D. McClure, his heirs [37] and assigns," conveying all of the above-described property to the said Charles D. McClure, and that such deed be delivered to the solicitors of the said McClure, and that the said McClure, will recover his costs, fixed at the sum of one hundred thirty-four and 15/100 dollars, to be ascertained in the manner required by the rules of this court.

WITNESS the hand of the Judge this 8th day of February, 1916.

GEO. M. BOURQUIN,

Judge of the United States District Court, Aforesaid.

Filed and entered Feb. 8, 1916. Geo. W. Sproule, Clerk.

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[38] Thereafter, on Feb. 9, 1916, defendant's Assignment of Errors was duly filed herein, in the words and figures following, to wit:

[39] *United States District Court, in and for the District of Montana.*

CHARLES D. McLURE,

Complainant,

vs.

ROD D. LEGGAT,

Defendant.

**Assignment of Errors.**

COMES NOW the defendant above named, by his solicitors, and says that in the decision of said cause and the decree heretofore entered herein on the 8 day of Feb., 1916, the Court erred in the following particulars:

1. The Court erred in finding that all of the allegations of the complaint are true.

2. The Court erred in finding that, at the time of the execution sale in the case of Ira T. Wight and others against Charles D. McLure, the defendant was a co-owner with the complainant in each and all of the four patented mining claims described in complainant's bill of complaint.

3. The Court erred in finding that, at the time of the execution sale referred to in assignment number 2, the defendant owned an undivided interest in the Eastern quartz lode mining claim different from the three-fourths interest of the complainant.

[40] 4. The Court erred in finding that, at the time of the execution sale referred to in assignment number 2 hereof, the defendant owned an undivided interest in the Ouichita quartz lode mining claim different from the three-eighths interest of the complainant.

5. The Court erred in finding that, at the time of the execution sale referred to in assignment number 2 hereof, the defendant owned an undivided interest in the Bland quartz lode mining claim different from the one-sixth interest of the complainant.

6. The Court erred in finding that, on the day of



the execution sale referred to in assignment number 2, the complainant requested the defendant to become a purchaser at the said sale and to hold the title, if any were subsequently obtained by the defendant, as a mortgage to secure the amount that might be paid by the defendant at the said sale in payment and satisfaction of the judgment and execution issued against the complainant in the suit of Ira T. Wight and others vs. the complainant.

7. The Court erred in finding that the defendant agreed with the complainant that he would bid an amount equal to the judgment as to principal, interest and accruing costs and expenses of sale when the sheriff should offer the said real property above described for sale under the execution issued in Wight et al. vs. complainant.

[41] 8. The Court erred in finding that the defendant, pursuant to the agreement above referred to, appeared at the said sale and did bid pursuant to his alleged agreement with the complainant to hold the said title as security for his bid.

9. The Court erred in finding that the complaint was able to redeem the property described in his bill of complaint and was willing to do so and signified his intention and desire to do so at many times between the 6th day of June, 1913, and the 6th day of June, 1914.

10. The Court erred in finding that the defendant informed complainant repeatedly that after the period of one year from the date of the said execution sale might expire, provided there was no redemption, defendant would hold any title that might

be obtained by reason of the expiration of time merely as a mortgage to secure the repayment from the complainant of the sum bid at the execution sale by the defendant and interest thereon at the rate of eight per cent per annum.

11. The Court erred in finding that, between the 6th day of June, 1913, and the 6th day of June, 1914, the defendant agreed with the complainant that if the complainant at any time after the said 6th day of June, 1914, would repay to the defendant the sum of one thousand four and 15/100 (\$1,004.15) dollars, together with interest at the rate of eight per cent per annum, defendant would reconvey to [42] complainant all of the real property described in plaintiff's bill of complaint.

12. The Court erred in finding that the deed from the sheriff of Silver Bow County to the defendant, issued on the 11th day of June, 1914, was obtained by reason of the alleged trust reposed in the alleged promise and alleged agreement of the defendant alleged to have been made to complainant to reconvey at any time to complainant the said lands, upon payment of the said amount of money bid by the defendant at the execution sale of Wight and others versus complainant.

13. The Court erred in finding that, had complainant sought bidders, complainant's interest in any one of the four parcels of land described in plaintiff's bill of complaint would have brought the amount of the said judgment of Ira T. Wight et al. versus complainant.

14. The Court erred in finding that no other per-

sons were present at the said sale except the complainant, defendant, the sheriff or his deputy and one of the plaintiffs.

15. The Court erred in concluding that the plaintiff was entitled to recover of and from the defendant the interest in the mining claims set out in the complaint and claimed by him.

16. The Court erred in finding that the defendant agreed to bid in the property described in complainant's bill of complaint for the amount of the judgment in Wight [43] and others versus complainant and hold it until plaintiff redeemed.

17. The Court erred in finding that complainant was let to believe by the defendant that he need not redeem within the time fixed by the statute in conventional cases, and that complainant relied thereon and acted accordingly.

18. The Court erred in concluding that where the purchaser at sheriff's sale leads the judgment debtor to believe he can redeem after the statutory time runs and thus causes him to fail to redeem before the statute runs, the purchaser waives the time and the debtor can redeem within a reasonable time after the statute runs.

19. The Court erred in concluding that in the present case, the complainant offered to redeem within a reasonable time after the period of redemption expired.

WHEREFORE the said defendant, Rod D. Leggat, prays that the said decree of the said District

Court of the United States for the District of Montana be reversed.

NOLAN and DONOVAN,  
Solicitors for Defendant.

Service of the foregoing assignment of errors acknowledged and copy thereof received this 12th day of February, 1916.

GUNN, RASCH & HALL,  
MAURY, TEMPLEMAN & DAVIES,  
Solicitors for Complainant.

Filed Feb. 9th, 1916. Geo. W. Sproule, Clerk.

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[44] Thereafter, on Feb. 9, 1916, Petition for Appeal and Allowance was duly filed herein, in the words and figures following, to wit:

[45] *United States District Court, in and for the  
District of Montana.*

CHARLES D. McLURE,  
vs. Complainant,

ROD D. LEGGAT,  
Defendant.

**Petition for Appeal and Allowance.**

The above-named defendant, Rod D. Leggat, conceiving himself aggrieved by the decree entered in the above-entitled court on the 8th day of Feb., 1916, in the above-entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that an appeal be allowed and that a citation issue as provided by law, and that



a transcript of the records and proceedings upon which said decree was based duly authenticated may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and your petitioner further prays that a proper order touching the security to be required by him to effect his appeal be made.

NOLAN and DONOVAN,  
Solicitors for Defendant.

[46] The foregoing petition is hereby granted and the appeal is hereby allowed this 9th day of February, 1916, and the bond on appeal is hereby fixed in the sum of three hundred (\$300) dollars.

GEORGE M. BOURQUIN,  
District Judge.

Service of the foregoing petition for appeal and allowance and copy acknowledged as received this 12th day of February, 1916.

GUNN, RASCH & HALL,  
MAURY, TEMPLEMAN & DAVIES,  
Solicitors for Complainant.

Filed Feb. 9, 1916. Geo. W. Sproule, Clerk.

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[47] Thereafter, on Feb. 12, 1916, Bond on Appeal was duly filed herein, in the words and figures following, to wit:

[48] *United States District Court, in and for the  
District of Montana.*

CHARLES D. McLURE,	Complainant,
vs.	
ROD D. LEGGAT,	Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, ROD D. LEGGAT, as principal, and D. J. Fitzgerald and Frank Boucher, as sureties, are held and firmly bound unto the above-named Charles D. McLure in the sum of three hundred (\$300) dollars, the payment of which well and truly to be made we bind ourselves jointly and severally, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 12th day of February, 1916.

Whereas the above-named defendant has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered and entered in the above-entitled cause in the United States District Court for the District of Montana, on the 8th day of Feb., 1916;

NOW, therefore, the condition of this obligation is such that if the above-named defendant, Rod D. Leggat, shall [49] prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him if he fails to make good his plea, then the above obligation is to be void, otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, we hereto set our hands this 12th day of February, 1916.

ROD D. LEGGAT.

By ALEXANDER LEGGAT,

His Attorney in Fact.

D. J. FITZGERALD.

FRANK BOUCHER.

State of Montana,  
County of Silver Bow,—ss.

D. J. Fitzgerald and Frank Boucher, sureties on the foregoing bond, being severally sworn, each for himself, says: That he is a resident and freeholder within this State, and is worth the sum specified in the foregoing bond as the penalty thereof over and above all his just debts and liabilities and exclusive of property exempt from execution.

D. J. FITZGERALD.

FRANK BOUCHER.

Subscribed and sworn to before me this 12th day of February, 1916.

T. F. NOLAN,

Notary Public for the State of Montana, Residing  
at Butte, Montana.

My commission expires June 17, 1917.

[50] The foregoing bond on appeal is hereby approved this 12th day of Feb., 1916.

BOURQUIN.

District Judge.

Service of the foregoing bond on appeal acknowledged and copy thereof received this 12th day of February, 1916.

GUNN, RASCH & HALL,

MAURY, TEMPLEMAN & DAVIES,

Solicitors for Complainant.

Filed Feb. 12, 1916. Geo. W. Sproule, Clerk.

[51] Thereafter, on Feb. 12, 1916, Citation was duly issued herein, which Citation is hereto annexed and is in the words and figures following, to wit:

[52] *United States District Court, in and for the District of Montana.*

CHARLES D. McLURE,

Complainant,

vs.

ROD D. LEGGAT,

Defendant.

**Citation on Appeal.**

The President of the United States to Charles D. McLure, Complainant, and to Messrs. Gunn, Rasch & Hall, and Maury, Templeman & Davies, His Solicitors, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the District Court of the United States in and for the District of Montana, wherein Rod D. Leggat is the appellant and Charles D. McLure is the appellee, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. GEORGE M. BOURQUIN, District Judge of the United States District Court in



and for the District of Montana, this 12 day of Feb., 1916.

BOURQUIN,  
District Judge.

[53] Service of the foregoing citation on appeal acknowledged and copy thereof received this 12th day of February, 1916.

GUNN, RASCH & HALL,  
MAURY, TEMPLEMAN & DAVIES,  
Solicitors for Complainant.

[54] [Endorsed]: No. 22. United States District Court, District of Montana. Charles D. McLure, Complainant, vs. Rod D. Leggat, Defendant. Citation on Appeal. Filed Feb. 12, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk.

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[55] That on the 25th day of February, 1916, Praeceptum for Transcript on Appeal was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States for the  
District of Montana.*

CHARLES D. McLURE,

Plaintiff,

vs.

ROD D. LEGGAT,

Defendant.

**Praeceptum [for Transcript of Record].**

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit

Court of Appeals for the Ninth Circuit, pursuant to appeal allowed in the above-entitled cause, and to incorporate into such transcript of record the following and no other papers, or exhibits, to wit:

1. The plaintiff's bill of complaint.
2. Defendant's answer.
3. Plaintiff's amendment to his bill of complaint filed —, 1915.
4. Defendant's amendment to his answer filed —, 1915.
5. The decision of the Court with memorandum attached thereto, filed on the 22d day of January, 1916.
6. Decree of the Court rendered herein February 8, 1916.
7. Defendant's assignment of errors.
8. Defendant's petition for appeal and allowance.
9. Bond on appeal.
10. Citation on Appeal with admission of service.
11. The condensed statement of the evidence.

And that the same be duly certified by you as required by law and the rules of court; and that you further state in your [56] certificate under seal, the cost of the record and by whom paid.

NOLAN & DONOVAN,  
Attorneys for Defendant.

Service of the foregoing praecipe acknowledged and copy thereof received this 24th day of February, 1916.

GUNN, RASCH & HALL,  
MAURY, TEMPLEMAN & DAVIES,  
Attorneys for Defendant.

Filed Feb. 25, 1916. Geo. W. Sproule, Clerk.

[57] Thereafter, on March 6, 1916, Statement of Evidence on Appeal was duly approved and filed herein in the words and figures following, to wit:

[58] *In the District Court of the United States for the District of Montana.*

Before Hon. GEORGE M. BOURQUIN, Judge.

At Helena, Montana.

CHARLES D. McLURE,

Plaintiff,

vs.

ROD D. LEGGAT,

Defendant.

**Condensed Statement of Evidence.**

June 21st and 22d, 1915.

**APPEARANCES:**

Messrs. MAURY, TEMPLEMAN & DAVIES,  
and Messrs. GUNN, RASCH & HALL, for  
Plaintiff.

Messrs. NOLAN & DONOVAN, and Messrs.  
WALSH, NOLAN & SCALLON, for De-  
fendant.

**[Testimony of L. P. Sanders, for Plaintiff.]**

[59\*—1†] L. P. SANDERS, a witness called in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination by Mr. MAURY.

The WITNESS.—My name is L. P. Sanders. I

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\*Page-number appearing at top of page of original certified Record.

†Original page-number appearing at top of page of Condensed Statement of Evidence as same appears in Certified Transcript of Record.

(Testimony of L. P. Sanders.)

I am an attorney at law, practicing in Silver Bow County for the last fifteen or twenty years, since 1900. I am acquainted with the defendant in this case, Mr. Rod D. Leggat, and with Mr. Chas. D. McLure, the plaintiff.

Q. Now, in a general, professional way, I will ask you if you are acquainted with the ground described as the Eastern quartz lode mining claim Survey No. 1230, Silver Bow County, Montana, the Ouichita quartz lode mining claim, Survey No. 1239, the Bland quartz lode mining claim, Survey No. 1160, situated in the northern portion of the Butte District?

A. I never was on the ground, but I am familiar with the maps, and know there are such claims within the Summit Valley Mining District in the county.

During the year 1912 I bore some professional relations with Messrs. Wolvin and Hayes—the firm of Kremer, Sanders and Kremer did. The matters were under my immediate charge as a member of the firm. During the summer of 1912, with the Eastern quartz lode mining claim, I had negotiations and transactions with Mr. Leggat on behalf of Wolvin & Hayes. I did not have any negotiations directly with McLure prior to the 1st day of July, 1912. My recollection is that I did not see Mr. McLure until subsequent to that time.

Q. Will you tell us, now, the nature of Mr. Leggat's business about that claim with you, and what he said, and what he did?



(Testimony of L. P. Sanders.)

[60—2] A. The firm of Kremer, Sanders & Kremer represented Wolvin & Hayes, who were acquiring portions of a large number of mining claims, or interests in mining claims lying north of the operating mines in Butte in the vicinity of the Butte and Superior, and they desired a bond upon the Eastern and other claims, and sometime prior to the 1st day of July of that year I had a conference with Mr. Rod D. Leggat, in behalf of Wolvin & Hayes desiring to secure an option on this claim, a three-quarter interest, as I recall it, in the Eastern belonged to Mr. McLure. I don't think I had examined the abstracts of title; but on the first conference I had, I knew that much, that Mr. McLure had an undivided three-quarters interest, and the balance of the claim belonged to T. Stewart White and Mr. Rod D. Leggat. Mr. T. Stewart White, to my knowledge, was never in Montana during these negotiations; I had never seen him, nor was Mr. McLure, either. Mr. Leggat advised me that the consideration for the Eastern under the option to Wolvin & Hayes was \$200,000, ten per cent of which was to be paid down simultaneously with the execution of the option and deposited in the State Savings Bank of Butte, Montana. I inquired of Mr. Leggat as to the means of securing some conveyance, or acquiescence in the option from the opposing owners, T. Stewart White and Mr. Charles D. McLure. At that time he told me, substantially, I cannot repeat his exact language, but he told me substantially, that he was handling the

(Testimony of L. P. Sanders.)

matter for T. Stewart White and Charles D. McLure, and that they would be satisfied with whatever he did with reference to the execution of this option.

Q. Did Rod D. Leggat sign any papers in your presence with reference to this ground?

A. I desire to say that, as to the option which was executed [61—3] on or about the last day of July, 1912, upon being subpoenaed in this case I made a search, that is, I made inquiry of the officers of the Butte & Superior Copper Co., Limited, and I have been unable to obtain a copy of that option, as I am advised it has been sent to New York to Wolvin & Hayes subsequently to the execution of the option on July 1st, 1912, or about that time, assigning and transferring all their rights to the Butte & Superior Copper Co., Limited, or on or about the 1st day of July, and my best recollection at this time is that Mr. Rod D. Leggat signed this paper which I have in my hand, and I signed it as the agent for Wolvin & Hayes.

Mr. MAURY.—We offer this paper in evidence at this time and ask that it be marked Plaintiff's Exhibit "A," and made a part of the record.

Plaintiff's Exhibit "A" received in evidence without objection, and is as follows:

**[Plaintiff's Exhibit "A," Option, July 1, 1912.]**

"This envelope contains check for \$20,000, and an option agreement whereunder Rod D. Leggat agrees to sell A. B. Wolvin and John M. Hayes, all of the Eastern quartz lode mining claim, Survey No. 1230,

situated in the Silver Bow County, Montana, total purchase price, \$200,000, if the option exercised. Payments thereof as follows: 10% on July 1st, 1912; 20% on or before January 1st, 1913; 70% on or before January 1st, 1914; Leggat agrees that he will cause to be made and executed good and sufficient deed of conveyance to Wolvin & Hayes, or their assigns, to all of the Eastern lode claim free and clear of the incumbrances and dower rights, and will place such deed in escrow in the State Savings Bank of Butte, Montana, said deed to be delivered to Wolvin & Hayes, or their assigns, upon payments as above.

Enclosed check is for \$20,000 for payment of the foregoing 10% on said purchase price, to be held by you for [62—4] payment to the owners of the said claim provided they deposit with you a deed or deeds conveying to Wolvin & Hayes, or their assigns, the title above described. Others besides Leggat own the claim described, but he has agreed to cause good and sufficient title to be conveyed, hence no part of this \$20,000 is to be paid to him until he has complied with his agreement. You will hold this \$20,000 until such time as he has complied with the enclosed option. Wolvin & Hayes will advise you when good and sufficient title to all of said claim has been conveyed to them by the owners of said claim and thereafter payment of the enclosed will be made to such owners.

WOLVIN & HAYES.

By L. P. SANDERS,

Agent

ROD D. LEGGAT.

Dated this 1st day of July, 1912."

(Testimony of L. P. Sanders.)

Q. Was this paper which I now hand you signed subsequently?

A. To the best of my recollection at this time, Mr. Rod D. Leggat and Mr. Charles D. McLure, signed the paper which I hold in my hand, and I signed it on behalf of Wolvin & Hayes. This was at a time in August, 1912, and Mr. Charles D. McLure had reached the city of Butte, Montana.

Q. Is this paper one which has reference to the same transaction as the other paper?

A. Yes, it states that this escrow agreement is to be taken in connection with that certain escrow agreement of July 1st, 1912, deposited herein, signed by Rod D. Leggat and Wolvin & Hayes, and which has been introduced in evidence this morning.

Mr. MAURY.—We offer this paper in evidence and ask that it be marked Plaintiff's Exhibit "B."  
[63—5]

Paper received in evidence, without objection, marked Plaintiff's Exhibit "B," and is as follows:

**[Plaintiff's Exhibit "B," Escrow Agreement,  
August 3, 1912.]**

"August 3d, 1912.

State Savings Bank,  
Butte, Montana.

Gentlemen: In the within envelope is an agreement by Rod D. Leggat to A. B. Wolvin and John M. Hayes, to sell the Eastern Lode, Silver Bow County, Montana, dated June 20, 1912. The Eastern Lode is owned one-eighth by Rod D. Leggat; one-eighth



by T. Stewart White; six-eighths by Charles D. McLure.

Also enclosed are executed deeds by Leggat and wife, Stewart and wife, and C. D. McLure. Also enclosed is an agreement by Charles D. McLure with said Wolvin and Hayes. If Messrs. Wolvin and Hayes exercise the right to purchase, there is due to the owners of the Eastern Lode a balance of one hundred and eighty thousand (\$180,000) Dollars, which must be paid as per the agreement herein contained. In the event any payments are made on account of the within agreements, credit as follows:

One-eighth ( $\frac{1}{8}$ ) to Rod D. Leggat; one-eighth ( $\frac{1}{8}$ ) to T. Stewart White; and, when deeds have been deposited in this bank as provided in enclosed option of agreement between C. D. McLure and Wolvin and Hayes, credit three-quarters ( $\frac{3}{4}$ ) to Charles D. McLure and Charles D. McLure as guardian, as in said option provided. Deliver the deeds to Messrs. Wolvin & Hayes, or their nominee, only upon last payment as in the enclosed agreement provided.

Out of the \$20,000 heretofore deposited on July 1st, 1912, with this bank, you will pay \$15,000 thereof to Charles D. McLure, (he having this day deposited in this bank [64—6] deed from himself to Wolvin & Hayes), \$2,500 to Rod D. Leggat and \$2,500 to T. Stewart White. Future payments, if any, to be made to the party of the first part as in said option provided.

A substituted deed from Stewart White and wife

(Testimony of L. P. Sanders.)

to Wolvin and Hayes will later be delivered to Bank to take the place of the enclosed deed from White and wife to Wolvin & Hayes.

This escrow agreement to be taken in connection with that certain escrow agreement of July 1st, 1912, deposited herein, signed by Rod D. Leggat and Wolvin & Hayes. Time is of the essence of said agreement.

ROD D. LEGGAT,  
CHARLES D. McLURE,  
WOLVIN & HAYES,  
By L. P. SANDERS."

Cross-examination by Mr. NOLAN.

The WITNESS.—There were subsequent transactions with McLure, Leggat and White for this purchase. Twenty thousand dollars, ten per cent of the purchase price was deposited by Wolvin and Hayes through me in the bank for this option; Mr. Leggat secured a deed from T. Stewart White at my request; that was, to my best recollection also deposited in the bank, this deed from T. Stewart White. At any rate, that is my best recollection at this time; among these papers I found a carbon copy of a deed, a duplicate original signed by T. Stewart White and Mary E. White, acknowledged by them before Robert Finch, a notary public in Grand Rapids, Michigan, to an undivided one-eighth interest in and to the Eastern quartz lode mining claim, lot No. 169, township 3 North, range 7 West. I do not know where the original is. I assume it is in the bank. This is a copy,

(Testimony of L. P. Sanders.)

but I do not recollect why it was executed in duplicate. On the 2d day of August, 1912, Charles D. McLure executed and acknowledged [65—7] before John L. Templeman, a notary public, in Butte, an option to A. B. Wolvin and John M. Hayes upon an undivided three-fourths interest in and to the Eastern quartz lode mining claim, the consideration being \$150,000, on the basis of \$200,000 for the entire claim, and I found these papers, which likewise appears to be a carbon copy, but made a duplicate of the original, and here it is. That was executed by Mr. McLure by reason of the unfortunate condition of Mrs. McLure, and was elaborated, she being incapable of legally executing the papers and handling the matter, and he assumed to obligate himself to take all necessary steps to have her interest conveyed, in the event that the option was taken up. I am not sure, but I believe you asked me as to how much Mr. McLure got out of the twenty thousand dollars which was the original ten per cent payment on the option. I have no knowledge as to that, the twenty thousand dollars was deposited in the bank, and somebody got it, some or all of the parties interested, T. Stewart White, Charles D. McLure and Rod D. Leggat got the money, the option afterwards being thrown up.

Q. This instrument of the 12th of July, was the one on which you got the lease and option on Mr. McLure's interest in the Eastern?

A. The twenty thousand dollars was payed into the bank on or about the 1st of July, 1912, upon Mr. Rod

(Testimony of L. P. Sanders.)

D. Leggat's executing an escrow agreement, the escrow agreement which is an exhibit here, an option which accompanied it subsequently to this option which you hold in your hands; Mrs. McLure was restored to mental competency and executed with her husband other papers affecting arrangements.

Mr. NOLAN.—We offer this paper in evidence as a part of the same transaction and ask that it be marked Plaintiff's Exhibit "C."

[66—8] Plaintiff's Exhibit "C" received in evidence without objection, and is as follows:

**[Plaintiff's Exhibit "C," Lease—August 2, 1912.]**

"THIS INDENTURE made this 2d day of August, 1912, between CHARLES D. McLURE, party of the first part, A. B. WOLVIN and JOHN M. HAYES, party of the second part, WITNESSETH:

Whereas, the party of the first part is the owner of an undivided seven-twelfths interest in and to the Eastern quartz lode mining claim, Lot No. 169, Tp. 3 North of Range 7 West, Montana principal meridian, and claims to be the owner of an additional one-sixth interest in said Eastern quartz lode mining claim by virtue of conveyances of such interest from the heirs at law of his mother, Mrs. Margaret E. McLure, now deceased; and

Whereas, it is the intention of the parties hereto for the party of the first part to give unto the parties of the second part an option to purchase the entire seven-twelfths and one-sixths interest in the said Eastern quartz lode mining claim at the price of one hundred and fifty thousand (\$150,000) dollars,



to be paid as hereinafter set forth.

NOW, THEREFORE, for and in consideration of the sum of one (\$1) dollar and other valuable considerations, cash in hand paid, the receipt whereof is hereby acknowledged, the said party of the first part does grant unto the said parties of the second part the right and privilege of purchasing the foregoing interest, in all a three-fourths undivided interest in the above-named quartz lode mining claim upon the terms and conditions hereinafter specified, and does undertake and agree that he will in all respects comply with the conditions, covenants and obligations hereinafter set forth, and to be by him complied with. The property covered by this option, and to purchase which said option is given in accordance with the terms [67—9] and conditions hereof is as follows:

An undivided three-fourths interest in and to the Eastern quartz lode mining claim above described; all of the above-described property being in Summit Valley Mining District, Silver Bow County, Montana. The purchase price of said undivided three-fourths interest in and to said Eastern quartz lode mining claim under said option shall be the sum of \$150,000, and the time and manner of making payment of the purchase price under said option shall be as follows:

Ten per cent. of the said purchase price, to wit, the sum of \$15,000, is payable forthwith upon the execution of this instrument, and upon the deposit in bank as herein provided, of a deed executed in so far

as Charles D. McLure personally is concerned, conveying by good and sufficient title, as far as Charles D. McLure personally is concerned, the said undivided three-fourths interest in said lode claim; and as to the said undivided one-sixth interest in and to the said lode claim claimed to be owned in fee simple absolute by Charles D. McLure, subject, however, to the inchoate right of dower of the wife of said Charles D. McLure, the said Charles D. McLure will forthwith proceed to cause an administrator of the estate of Mrs. Margaret McLure to be appointed with all reasonable diligence by the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, and he, the said Charles D. McLure, will procure with all diligence a decree of distribution to himself as the assign of all of the heirs of the said Mrs. Margaret E. McLure of the said undivided one-sixth interest in the Eastern quartz lode mining claim, or else he, the said Charles D. McLure, will [68—10] establish the fact before the said court and procure a decree of the said court establishing the said fact that Mrs. Margaret E. McLure never was the owner of any portion of the said one-sixth interest except as trustee of the said Charles D. McLure, he being at all times the equitable owner of all of said one-sixth interest, and entitled to a conveyance of the legal title from Mrs. Margaret E. McLure, wherever he should request the same; and if within twelve months from date hereof, the said Charles D. McLure does not procure such decree of distribution to him, or such

establishment before the said court of the fact that he was entitled to such conveyance from all of the heirs, creditors and representatives and devisees and legatees of Mrs. Margaret E. McLure, then, upon demand of said A. B. Wolvin and John M. Hayes or their heirs, representatives and assigns, the said Charles D. McLure will repay unto the said party of the second part herein, or their heirs or assigns, such portion of the purchase price for the said Eastern quartz lode mining claim as shall heretofore have been paid for, or on account of the said undivided one-sixth interest in the said quartz lode mining claim; it being understood and agreed that as to the seven-twelfths interest not so clouded, the portions of purchase price which shall have been already paid shall in no wise be affected by this agreement.

And furthermore, it is agreed that with due diligence the said Charles D. McLure will proceed to procure as guardian of Mrs. Clara Edgar McLure, his wife, proper orders and deeds of conveyance of her inchoate right of dower of all of the lands herein described and conveyed such inchoate right of dower hereunder, provided that such proceedings shall not at this time affect the rights of the said Charles D. McLure to the immediate possession and use of the first payment hereunder; but in the [69—11] event that such proceedings be not completed before the second payment hereunder then one-third of the second payment may be retained by the banking house mentioned until such inchoate right of dower be transferred or be cut off by death; and in the

event that such proceedings be not completed before the last payment hereunder, the one-third of the last payment may be retained by the banking house hereinafter mentioned until such inchoate right of dower be transferred or be cut off by death.

Twenty per cent of said purchase price on or before January 1st, 1912, provided said party of first part has within said time deposited or *cause* to be deposited *to* said bank the deed herein mentioned to Charles D. McLure to said parties of the second part, and caused to be performed the matters and things in the perfection in the said titles hereinbefore agreed to be performed by him; seventy per cent of said purchase price on or before January 1st, 1914, provided said party of first part has within said period deposited or caused to be deposited in said bank deed from Charles D. McLure to said parties of the second part, and done and performed the covenants and agreements as to the perfection of the said titles hereinbefore set forth on him binding.

It is expressly understood and agreed that none of said payments upon the interests herein described shall be paid to the said party of the first part until the deed from Charles D. McLure to said parties of second part or their heirs or assigns has been deposited in said bank as herein provided, and said party of first part hereby agrees that he will, with all due diligence, proceed to institute and prosecute to a termination, all necessary and proper legal proceedings to the end and for the purpose of having all deeds and all of the necessary instruments duly



made and executed and deposited in escrow [70—12] in said bank for delivery to said parties of the second part or their assigns under the terms and convictions hereof, conveying unto the said parties of the second part, their assigns, the interest in said mining claim, together with all of the right, title and interest of said party of first part, and of any person who has or claims to have or who shall hereafter have or claim to have any interest, estate, claim or right in and to said interest, in and to said mining claim, free and clear from all incumbrances and dower rights, and said deeds conveying, by good and sufficient title said interest, together with all of the right, title and interest of the said party of the first part, and of his wife, and of any other person whomsoever who may have an estate or interest in and to the above-described three-fourths interest in the said lode claim, shall be placed in the State Savings Bank of Butte, Montana, with directions therewith instructing and requiring the said banking house to deliver said deed of conveyance to the said A. B. Wolvin and John M. Hayes, or their assigns, or to whomsoever said A. B. Wolvin and John M. Hayes shall designate upon the payment of the purchase price of the said interest herein named within the time herein provided.

It is further agreed and understood that all payments to be made hereunder at the option of the parties of the second part are to be paid into the State Savings Bank, of Butte, Montana, as follows: Two-thirds of each payment herein provided for to the

credit of Charles D. McLure, and one-third to the credit of Charles D. McLure, as guardian of the person and estate of Clara Edgar McLure, an insane person.

For and in consideration of the foregoing, and of the royalties, covenants and agreements hereinafter mentioned, and of the sum of \$1, cash in hand paid, receipt of which is [71—13] hereby acknowledged, the said party of the first part does hereby grant, demise and let unto the said A. B. Wolvin and John M. Hayes, or their assigns, all of the foregoing described mine and mining claim, to have and to hold unto the said A. B. Wolvin and John M. Hayes, or their assigns, during the life of the option and agreement, and that during such terms the said A. B. Wolvin and John M. Hayes, or their assigns, shall have the right to enter upon the said mining property and premises and work the same in a minerlike fashion, and to prospect and develop the same, and to occupy and let full possession of all of said premises; it being especially understood and agreed that if said party of second part should elect to do any work thereon they may do the same in such place and in such manner and in such amount as they may see fit.

In consideration whereof, the said A. B. Wolvin and John M. Hayes, for themselves, or on behalf of their assigns, agree to pay to the said party of the first part, as royalty, twenty-five per cent of the net smelter or mill returns of all ore to be extracted and shipped from said premises, and that the amount of said royalties, if any so *paid*, said deduction to be

made upon the next payment due hereunder, following the payment of said royalties, if any.

It is further agreed that the said party of first part, shall at all reasonable times have the privilege of entering into and examining all workings of said property, and shall be given free and ready access thereto so long as same does not interfere with mining operations conducted on said premises.

It is mutually understood that each and every clause of this agreement shall extend to and be binding upon the heirs, administrators, executors and lawful assigns of the respective parties hereto.

[72—14 ] It is further understood and agreed by and between the parties hereto, that in the event the parties of the second part shall fail to exercise the said option purchase herein given within the time prescribed by the payment of the amounts herein designated, all sums paid hereunder shall be and become the property of the party of the first part (providing he, the said party of the first part, has not, through failure to get clear title of the one-sixth interest bought by him from the heirs of Mrs. Margaret E. McLure, caused delay himself, or by the failure to give clear title to the inchoate right of dower of Mrs. Clara Edgar McLure, caused delay himself); and in such event, all of obligations upon the part of all parties hereto shall terminate, and upon a failure of the parties of the second part, or their assigns, to make such payments within the time and in the manner prescribed, the said party of the first part shall have the right at once to re-enter and take possession of such property.

Time is strictly of the essence of this contract, but it is understood that due diligence only is required of Charles D. McLure in the matter of court proceedings as to clearing his title to the one-sixth interest, and as to getting the right to sell his wife's inchoate right of dower.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and year first above written.

CHARLES D. McCLURE."

Acknowledged before John L. Templeman, Notary Public, for the State of Montana, residing at Butte, Montana, on the 2d day of August, 1912.

(Notarial Seal)

[73—15] Q. Do these papers contain any recent negotiations between Mr. McLure and this company?

A. I have no recollection of it, I can't say, I don't believe they do.

Mr. NOLAN.—We also offer in evidence at this time deed dated August 8th, 1912, as a part of the said transaction and ask that it be marked Defendant's Exhibit 1, and made a part of the record.

Defendant's Exhibit 1 received in evidence without objection, and is as follows:

**[Defendant's Exhibit 1—Agreement, August 8, 1912  
—Thomas Stewart White et ux. and A. B. Wolvin et al.]**

"THIS INDENTURE made and entered into this 8th day of August, 1912, by and between Thomas Stewart White, and Mary E. White, his wife, parties of the first part, and A. B. Wolvin and J. M. Hayes,



parties of the second part:

WITNESSETH: That for and in consideration of the sum of One (\$1) Dollar, and other valuable considerations, cash in hand paid, the receipt of which is hereby acknowledged, the said parties of the first part do hereby grant unto said parties of the second part the right and privilege of purchasing all of the following described property upon the terms and conditions herein specified, to wit:

The property covered by this option and to purchase which said option is given in accordance with the terms and conditions hereof is as follows:

All of the right, title and interest of the parties of the first part in and to an undivided one-eighth ( $\frac{1}{8}$ ) interest in and to the 'Eastern' Quartz Lode Mining claim, Lot 169, Township 3 North of Range 7 West, Montana Principle Meridian.

All of the above-described property being in Summit Valley Mining District, Silver Bow County, Montana.

The purchase price of said property under said option [74—16] shall be the sum of twenty-five thousand (\$25,000) dollars, and the time and manner of making payments of said purchase price under said option shall be as follows:

Ten per cent of said purchase price upon the execution and delivery as herein provided of a deed executed by the parties of the first part and deposited in the State Savings Bank of Butte, Montana;

Twenty per cent (20%) of said purchase price on or before January 1st, 1914, provided said deed has so been deposited.

Seventy per cent (70%) of said purchase price on or before January 1st, 1914, provided said deed has so been deposited.

And it is further stipulated and agreed that contemporaneous with the execution of this instrument, that said parties of the first part will cause to be made and executed a good and sufficient deed of conveyance, conveying unto the said A. B. Wolvin and J. M. Hayes, or their assigns, or any person or persons whom they may designate, all of the said above-described property, free and clear from all encumbrances and dower rights, and said deed shall be placed in escrow in the banking house of the First National Bank of Butte, Montana, with directions therewith instructing and requiring the said banking house to deliver the said deed of conveyance to the said A. B. Wolvin and J. M. Hayes, or their assigns, or to whomsoever said A. B. Wolvin and J. M. Hayes shall designate, upon the payment of the purchase price herein named within the time herein provided.

It is further agreed and understood that all payments to be made hereunder may, at the option of the parties of the second part, be paid unto the First National Bank of Butte, Montana, to the credit of the parties of the first part.

[75—17] For and in consideration of the foregoing, and of the royalties, covenants and agreements hereinafter mentioned, and of the sum of one (\$1) dollar, cash in hand paid, and receipt of which is hereby acknowledged, the said parties of the first part do hereby grant, demise and let unto the said A. B. Wolvin

and J. M. Hayes, or their assigns, all of the foregoing described mines and mining claims; to have and to hold unto the said A. B. Wolvin and J. M. Hayes, or their assigns, during the life of the option and agreement, and that during said term the said A. B. Wolvin and J. M. Hayes, or their assigns, shall have the right to enter upon said mining property and premises and work the same in a minerlike fashion, and to prospect and develop the same and to occupy and hold full possession of all said premises, it being especially understood and agreed that if said parties of the second part should elect to do any work thereon, they may do the same in such place and in such manner and in such amount as they may see fit. In consideration whereof, the said A. B. Wolvin and J. M. Hayes, for themselves, or on behalf of their assigns, agree to pay to the said parties of the first part as royalty twenty-five (25%) per cent of the net smelter returns of all ore to be extracted and shipped from said premises, and that the amount of said royalties, if any, so paid shall be deducted from the purchase price herein set forth, said deduction to be made upon the next payment due hereunder, following the payment of said royalties, if any.

It is further agreed that the said parties of the first part shall at all reasonable times have the privilege of entering into and examining all the workings of said property and shall be given free and ready access thereto so long as the same does not interfere with mining operations conducted on said premises.

[76—18] It is mutually agreed that each and every clause of this agreement shall extend to and be

binding upon the heirs, administrators, executors and lawful assigns of the respective parties hereto.

It is further understood and agreed by and between the parties hereto that in the event the parties of the second part shall fail to exercise the said option to purchase herein given within the time prescribed by the payment of the amounts herein designated, all sums so paid hereunder shall be and become the property of the parties of the first part, and all obligations upon the part of all parties hereto shall terminate; and upon a failure of the parties of the second part or their assigns to make such payments within the time and in the manner prescribed the said parties of the first part shall have the right to at once re-enter and take possession of said property. Time is of the essence of this agreement.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

T. STEWART WHITE,

MARY E. WHITE,

A. B. WOLVIN,

JOHN M. HAYES,

By L. P. SANDERS,

Agent.

State of Michigan,

County of Kent,—ss.

On this 8th day of August, 1912, before me, the undersigned, a notary public for the State of Montana, personally appeared Thomas Stewart White and Mary E. White, his wife, known to me to be the parties whose names are subscribed to the within in-



(Testimony of L. P. Sanders.)

strument, and who acknowledged to me that they executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Seal]

ROBT. FINCH,

Notary Public for the State of Michigan, residing at Grand Rapids, Michigan.

My commission expires Aug. 10, 1915.

[77—19] The WITNESS.—I can't say whether there have been any recent negotiations between Mr. McLure and the Butte & Superior Company for the purchase of his interest of the Eastern and Ouichita claims. I think there have been negotiations, but I had no part in them. Mr. Kremer, my partner, attended to the negotiations comparatively recently, and I don't remember whether the price at which Mr. McLure offered to sell his interest in the Eastern and Ouichita claims to the Butte and Superior Company was forty thousand dollars or one hundred and forty thousand dollars; I don't know from my own personal knowledge, but I heard some talk.

Redirect Examination by Mr. MAURY.

The WITNESS.—In the first instance I put the twenty thousand dollars I spoke of in the bank, and it was to be paid to the owners of the Eastern upon the deposit in the bank by them of good and sufficient deeds. My very best recollection is that Mr. Leggat and I went to the bank together and I put the check in there. None of the other owners were present. Mr. Leggat fixed the price on the property for all

(Testimony of L. P. Sanders.)

the parties. Mr. Leggat was the one who fixed the price for all the parties.

(Witness excused.)

**[Testimony of James E. Murray, for Plaintiff.]**

**[78—20]** JAMES E. MURRAY, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination by Mr. DAVIES.

The WITNESS.—I am an attorney at law practicing my profession in Butte, Silver Bow County, Montana. I have been acting as attorney for Mr. James A. Murray, the banker, at Butte. I also acted for the Hennessy Company in one suit, but I do not represent them generally. I know Mr. Rod D. Leggat, the defendant in this suit. I know Mr. Charles D. McLure, the plaintiff. As the attorney representing Mr. James A. Murray, I secured a judgment against Mr. Charles D. McLure. I would not be able to give you the date. I fought two suits against Mr. McLure. The first suit I brought against Mr. McLure was a number of years ago; the suit was brought to recover the sum of two thousand and some odd dollars which Mr. Murray claimed because of having paid that sum out in some suit that Mr. McLure was interested in; Mr. McLure came to Mr. Murray to get him to go on a bond in the Federal Court, and subsequently, after the suit had been lost by McLure, Mr. Murray was compelled to pay the bond. The last judgment I secured against him was sometime in 1913, I believe, as near as I can remember; it may have been in 1912, the year before that,

(Testimony of James E. Murray.)

but my best recollection is that it was during the year 1913. I would not be positive that it was prior to June 6, 1913. I made some effort to collect that judgment. I went to Mr. McLure about it, or at least I think he looked me up after I brought the suit, and I think I had a number of conversations with him after having brought the suit, and before entering judgment, and also after entering judgment, I had a number of conversations with him. I had a conversation with Mr. McLure wherein Mr. [79—21] Leggat was present shortly after the sale of this property on the Wight & Pew judgment. In fact nearly every conversation I had with Mr. McLure was at times when Mr. Leggat would be present. In fact I do not believe I ever saw Mr. McLure more than once or twice without Mr. Leggat being present. I think he came to my office once alone, but usually I would meet them at the hotel and Mr. Leggat would be with me.

Q. What was that conversation, the conversation you had shortly after the sale of this property?

A. Well, after securing the judgment, I told them that I wanted to know whether he would pay the amount, or whether I should proceed to enforce our claim by selling the property. It seems to me that during these negotiations I learned that the property had been sold under this Wight & Pew judgment and that it had been bought in by Mr. Leggat, or Mr. McLure told me that they expected to sell the property and that they did not want me to proceed in my matter so as to complicate the title any fur-

(Testimony of James E. Murray.)

ther, and that as soon as they sold it our judgment would be paid off, and requested me not to go ahead with it any further.

I can't give you any idea when this conversation was had, but it was sometime after I got my judgment, whatever date that judgment would be, it would be shortly after that judgment. It was subsequent to the sale under the Wight & Pew judgment, it was subsequent to the time that Mr. Leggat bought the property in, in fact I was told first—I didn't examine the record to see exactly what property was involved, but I was told at first that the Elvina was not included in it, but later on I learned that the whole four claims were included in that sale. My recollection is that Mr. Leggat was present at this conversation with Mr. McLure. He frequently, in that [80—22] conversation and other conversations, assured me that Mr. McLure would pay this judgment, and that Mr. McLure was very sorry that he had not attended to it before, because he regarded it as a sort of debt of honor and that he felt that Mr. Murray should be paid very promptly because he came to his assistance at a time when he needed a friend and went on this bond without any security whatever; and Mr. Leggat came to the bank to see Mr. Murray with Mr. McLure. Shortly after I brought the first suit, and at that time induced Mr. Murray to discontinue that suit and to accept a note from Mr. McLure, and the last suit was brought upon the note.

Now, I would not say that Mr. Leggat told me at



(Testimony of James E. Murray.)

any of these conversations that I had with Mr. McLure wherein Mr. Leggat was present, that he, Mr. Leggat, was simply holding the property for Mr. McLure, but Mr. McLure told me so. Mr. McLure told me in Mr. Leggat's presence and Mr. Leggat never denied it at all, at any time. I don't think any of these conversations with Mr. McLure, at which Mr. Leggat was present, were as late as the fall of 1914. I would not say that *that* there were any as late as the summer of 1914, July or August; I think they were all earlier than that. It may have been after the first of the year—it may have been after the first of the year, although I doubt very much whether I had any conversations with them later than January, 1914. I think it was 1913 that all of these conversations were had, and during the years before that. I had been talking to them off and on for a number of years. These transactions covered a number of years prior to that, and it was in 1913 that I brought the last suit on the promissory note.

I remember of bringing supplementary proceedings against Mr. Leggat. These conversations were before that, prior to the [81—23] supplemental proceedings. They were at least, or the last conversation I think we had would be a month or two prior to the supplementary proceedings. No, I can't remember the date of these supplementary proceedings. I intended to get those papers and look that up before I came over here, but I got busy on something else and didn't get much of a chance to do it.

I can't say how many times I have talked to Mr.

(Testimony of James E. Murray.)

McLure while Mr. Leggat was present since the sale of this property under the Wight & Pew judgment.

Q. And wherein, in these conversations, Mr. McLure has assured you that Mr. Leggat was just simply holding the property for him under that execution sale?

Mr. SCALLON.—We object to this question as the evidence sought to be elicited is incompetent, and not the best evidence of any agreement between the defendant and plaintiff. We also object to it as leading, and it is not in accord with preceding portions of the witness's testimony in assuming and suggesting that there were more than one conversation at which this alleged statement was made.

The COURT.—The objection will be overruled for the present, it may be assuming conditions which have not appeared as yet.

Mr. SCALLON.—We reserve for the present our right to make a motion to strike it out unless it be connected later on.

The COURT.—Unless this evidence is competent, it will receive no consideration. However, I think there should be no assumption. You may ask directly how many conversations there were the nature of which were as indicated in your question.

Q. How many conversations were there, Mr. Murray, wherein yourself and Mr. Leggat and Mr. McLure were present, and wherein Mr. McLure assured you that he still owned the property, and [82—24] Mr. Leggat was simply holding it for him under that execution sale.

(Testimony of James E. Murray.)

Mr. SCALLON.—To which we object as incompetent, irrelevant and immaterial.

The COURT.—The objection will be overruled for the present. Of course if the evidence is not competent it will be ignored. For the present the objection is overruled.

To which ruling of the Court counsel for defendant duly excepted.

A. There were two or three conversations in which the matter was discussed; of course, the representations made in the first conversation were that Mr. McLure owned the property and that Mr. Leggat had big it in and was going to carry it for him until a sale was made, and in the subsequent conversation they might not have repeated that statement, but the matter was referred to in a way that I was made to understand that they were trying to sell the property and as soon as they would sell it that Mr. Murray would get his money; I was urging them to hurry up and pay the claim that I had against them, and I think Mr. Leggat looked me up once or twice himself and wanted to have me go down to the hotel and meet Mr. McLure, and as I said before, Mr. Leggat was present at nearly every conversation I had. I said that Mr. Leggat looked me up once or twice with reference to this claim of mine—I sometimes, myself, would ask Mr. Leggat when he expected Mr. McLure in town, and he told me on one or two occasions when he expected him. Never at any of these conversations did Mr. Leggat claim that he owned the property, or that he was holding it for himself.

(Testimony of James E. Murray.)

He didn't say he was holding them for the purpose of making a sale, but he told me that they had endeavored to make a sale, and notwithstanding [83—25] the fact that the companies were holding these options to let them lapse, they expected to be able to make a deal with them yet. I remember at one time of also having a conversation with Mr. McLure wherein I accused him of putting this property, by virtue of this sale, out of his hands so I could not get hold of it. Mr. Leggat was not present at that time.

No cross-examination.

(Witness excused.)

**[Testimony of William McLure, for Plaintiff.]**

[84—26] WILLIAM McLURE, called as a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination by Mr. MAURY.

The WITNESS.—My name is William McLure. I am the son of Mr. Charles D. McLure. I am acquainted with Mr. Rod D. Leggat and have known him about five years. I did have a conversation with Mr. Leggat during the last winter about the properties which you have mentioned here this afternoon, the Ouichita and the Eastern quartz lode mining claims. That conversation took place in St. Louis. It was about the first of March of this year.

Q. How did the conversation arise, and what was said? A. Why, it came up—

Mr. SCALLON.—We object to any statements of



(Testimony of William McLure.)

the defendant, or any part of any conversation as being incompetent, and not the best evidence.

Objection overruled.

To which ruling of the Court counsel for defendant duly excepted.

Mr. SCALLON.—We object to it further for the reason that any interest in real estate promised to be conveyed must be set out in writing.

A. Why, we had decided, I talked it over with my father about selling the property several times, and about the middle of February, we decided that I would come to Butte and make a sale of the property, and I left St. Louis around the seventh or eighth of March, and it was just prior to that time that I had this conversation with Mr. Leggat. At this conversation I just simply told Mr. Leggat that I was coming to Butte to [85—27] try to make a sale of the Butte property. The properties I was speaking of were the Eastern, the Bland and the Ouichita; those were what I had always spoken of as the Butte properties, and he made no answer in regard to that; at that time my father came into the room and some other question was spoken of and he never made any answer at all. Prior to that time he had said something to me about my father owing him money. That was back in January, 1914, I think, or the year after that first bond expired, it was at that time and he came to him two or three times to get my father to consent to take it up in January, and he asked my father over with him, two or three times. Mr. Leggat knew I was coming to Butte, Montana, to sell

(Testimony of William McLure.)

this property, or to negotiate for the sale of it last March, because I told him so. He didn't make any claim of ownership. There was nothing said about my coming here to represent him in any way. He knew whom I was coming here to represent. That was my father.

Cross-examination by Mr. NOLAN.

The WITNESS.—This conversation occurred in St. Louis, at 822 Security Bldg. It is situated at the corner of Broadway and Low Street. It was in my father's office. It was around the first of March, the exact date I can't give you. I don't think it was as late as the fifth of March, 1915, but it was between the first of March and the eighth of March. I can't recall exactly where I was on the first of March, 1915, but I was at 822 Security Bldg., from 9 o'clock until 12. On the 2d of March, I was at 822 Security Bldg., from 9 o'clock till 2 o'clock. And also on the third day of March and on the 4th and on the 5th and on the 6th and the 7th. Not on the 8th. I left on the 8th of March for Montana from St. Louis. My father was present at this room in the Security Bldg., when [86—28] this conversation was had. It was a small room up on the eighth floor in that building. Just my father, Mr. Leggat and myself were present. At first my father left the room and then returned. So my father did not hear all this conversation, he came in just as it was finished, and that was the reason Mr. Leggat did not make any answer. Mr. Leggat used to come to my father's office about three times a week during last

(Testimony of William McLure.)

winter, during the time he was there. I can't say how often prior to this conversation I have related upon direct examination, how often before that I had seen him in my father's office during the winter of 1915, six times during February, March and the last part of January. I saw him in there in January. I would not say that I saw him in January, but I say I saw him in there six times between the 25th of January and the 8th of March, about six times; I would not say exactly six times. He was in St. Louis from the 25th of January until the 8th of March, and I was in St. Louis at that time. And I saw him at least six times between these dates, inclusive of the conversation I had with him in my father's office in this building. The only person present beside myself and father at one time was Mr. Charles Clark; that was the only time I can remember of him being present. Charles Clark is a cousin of mine, he was present, I think, once. I don't remember of anybody else being present at any of the times I saw him. I don't think I ever stated the time that I had this conversation with Mr. Leggat at my father's office until about a month ago, or sometime since I have come to Montana. I did not tell it, state it to my father between the time I heard Mr. Leggat state it until within last month. I told my father about it within the past month. At the time I saw Mr. Leggat in St. Louis, he was staying with Colonel Butler. I went out to the house to see [87—29] him. He used to walk up to the office, I didn't bring him up there. He did not accompany

(Testimony of Charles D. McLure.)

me to the office, I went out there to see him. I saw him at home three times between the 25th of January and the 8th of March. At nobody's direction. I went out there once at my father's direction, he asked me to go out and see Mr. Leggat, but the other two times I went out there on my own account. I did not go concerning any business, except as to his health. At the conversation that occurred at this particular time that I testified to on direct examination, I told Mr. Leggat that I was coming to Butte to sell the property, and he made no reply, and at that time my father entered the room.

Q. Do you know whether Mr. Leggat had a habit of getting his mail at your father's office in St. Louis? A. Yes.

Mr. MAURY.—Did Mr. Leggat get his mail at your father's office in St. Louis?

A. He got some of it there, yes. I can't say how long that had been going on.

(Witness excused.)

**[Testimony of Charles D. McLure, for Plaintiff.]**

[88—30] CHARLES D. McLURE, plaintiff, being duly sworn in his own behalf, testified as follows:

Direct Examination by Mr. RASCH.

The WITNESS.—My full name is Charles D. McLure. I live in St. Louis, Mo. It has been my place of residence since about 1881. Prior to that time I lived in Montana, from 1864 to 1881. I am past seventy-three. I came here to Montana on about the 4th of July, 1864. I came to Virginia City, Mon-



(Testimony of Charles D. McLure.)

tana. A part of the time I was engaged in freighting and prospecting, and afterwards in mining. I am acquainted with the defendant, Rod D. Leggat.

Q. How long have you known him?

A. It was some time, I think it was in 1867 or 1868, along there somewhere.

I became acquainted with him here in this State, in this Territory as it was at that time, in Helena. I am not sure as to the year or the date, but it was here in Helena. During the time of my acquaintance with Mr. Leggat my relations with him have been very friendly. We were engaged in business together, we were connected in this way: when I would come in here we would meet as merely friends, we would always get together and sometimes we would take dinner together, and sometimes he would go out to the mine above Helena here. I have a mine up above Helena, the first one was over in Scratch Gravel in 1864. Mr. Leggat was not interested with me in that mine. From the standpoint of social relations they had been very intimate. Of course I knew him in Butte after he moved over there and we always met at the hotels and saloons, or wherever we were to come together, and we were always friendly, and he has lived in the same neighborhood, and our friends were mutual. We were engaged in business together, after Granite came up, and I had some [89—31] money. We went into several propositions together. By "Granite" I mean the property at Granite out of which I made my money. The property is located at Philipsburg, Montana.

(Testimony of Charles D. McLure.)

The first enterprise or undertaking that brought us close together, and friendly, was during a strike over in Butte, and I and Mr. Leggat went into the Centennial Hotel—Dr. Beal was keeping it at the time, and took out dinner there, it was the midday meal, and as we were coming out Judge Andrew Davis was sitting there and Mr. Leggat says to the judge, “Mr. McLure does not believe that you got these threatening letters.” That was at the time of the riot, I can’t recall the year, but the judge replied, “Come over to the office and I will show you one over there” and—

Mr. SCALLON.—I object to this as irrelevant and immaterial and as not being responsive.

The WITNESS.—I hear what questions you are asking me, I catch what you say.

The first business I had with him directly was over at Sand Creek, or over at Sappington, Mr. Leggat had been holding the McVey and the Chili claims, two locations. I judge that was in the eighties—about 81 or 82. On this point I talked about the proposition of developing the property and was to build a ten-stamp mill on it and we were to divide the profits—Colonel Hart was interested in it—he was the first superintendent of the Granite—and I spent forty thousand dollars there. I think we continued the operations something like nine months or a year. The operations cost about forty thousand dollars.

Q. How much of that was contributed by Mr. Leggat?     A. None of it.

(Testimony of Charles D. McLure.)

[90—32] Mr. SCALLON.—We object to this. It seems to me that they are going entirely too far when they undertake to prove how much was spent on these different ventures, and as indicated by counsel in his opening statement that he would show what the balance against Mr. Leggat was, because that would compel us to go into an accounting of three or four ventures. I think it would be quite sufficient to prove that they were associated together.

The COURT.—I presume this is for the purpose of showing the magnitude of their business ventures. The objection is overruled.

To which ruling of the Court counsel for defendant duly excepted.

A. I spent forty thousand dollars there and it was unprofitable and I threw it up, and at the time I threw it up Mr. Leggat objected to it and brought Colonel Hart out there and he reported on it and I told him that that was as far as I wanted to go.

Mr. Leggat did nothing further in these operations than holding the bond and looking after the accounts; I think he paid them after the money was forwarded from St. Louis.

Q. Did he give all his personal aid and attention to the operations down there?

The COURT.—I think you need not go into the details on that matter.

A. It was simply an arrangement, it was a contract, I could release the contract at any time, it was my fault, it was not his fault, it was the fault of the property and not his.

(Testimony of Charles D. McLure.)

Mr. Leggat had the contract for the work and the spending of the money, always. Mr. Leggat supervised the work and I furnished the money.

[91—33] The next venture, business proposition, was some work we did during that time over in the Cardwell district, in Jefferson County, and I think it cost me something between seven and nine thousand dollars, I don't know which. That was during the slump in silver, or the year after that the work was continued on the Chili and McVey. The amount of money I spent in that venture was something like seven thousand dollars. I myself, only, contributed these funds to the operations. Mr. Leggat looked after the property, attended to the representation and attended to the discoveries, stakes, etc., he looked after that, naturally. It seems to me Mr. Leggat took a man out there by the name of Curry, and he was in charge of the Sand Creek properties, and he hired the men and sent them over there and Mr. Leggat paid them. Mr. Leggat handled the money. Well, that being unfortunate, not profitable, this Cardwell proposition, Mr. Leggat came to me one day and he says, "You own an interest in the Elvina" and he says, "Let's take that up"—and—that is one of the claims that is mentioned in this case here. I had represented the claim and got a quarter interest in it, and Mr. Leggat came to me and he says, "You own an interest in the Elvina" and he says, "Let's do some work on that." I had a quarter interest in it, and then a brother-in-law of mine, Mr. Clark, had another quarter and Mr. Thomas



(Testimony of Charles D. McLure.)

Argyle held another quarter, which he had acquired at some time by representing from Mr. Noyes, Mr. John Noyes. The result was we bought up the outstanding interests in the property for twelve thousand five hundred dollars, every quarter. I bought it up and paid the money to Mr. Leggat, and Mr. Leggat carried on the negotiations with my brother-in-law, yet I paid the money, I think we [92—34] sunk four hundred and thirty feet and I spent ninety thousand dollars on it. When he had to shut down on account of the fall in the price of silver, discontinued, one day I says to Rod, "There is not much chance for any payment back, let's cut the whole thing off and we will divide the properties" and we cleared that up entirely. We operated the Elvina right after the Chili days, continuous, one from the other. When silver went down, of course that made the operations unprofitable, that was somewhere along about the time when the Sherman Act was repealed, in 1896. All of the money was advanced by me. That operation cost me ninety thousand dollars. Mr. Leggat had charge of the operations, in the sense of paying all the bills, keeping up the machinery, hiring the men, and directing the work; he hired a foreman directly upon the work. The money that was advanced for the operation of the mine was entirely advanced by myself. That brings us down now to about 1896. During that time I had also an interest in a mine, in what was called the Eastern, acquired in the same way, it was a quarter interest. That is one of the claims that is mentioned in this

(Testimony of Charles D. McLure.)

case. That is another one of the claims I acquired by representing it for John Noyes in the early days, and the Bland was the same way and the Ouichita was staked by Mr. Argyle and myself, and these properties were bought by me. I bought until I had three-fourths of the Eastern, and I bought out Argyle until I had three-eighths of the Ouichita, and I owned a one-sixth interest in the Bland—we acquired one-third of that, both of us, Argyle and myself, by representing and I still withhold a one-sixth of that. Mr. Leggat and I leased the Eastern claim several times, and Mr. Leggat attended to collecting the royalty, and on the Bland he attended [93—35] to collecting the royalty, and others, and he used to pay such expenses as came along, such as taxes, etc. I think he had an interest in the Eastern at that time, I think he bought out one of the parties. That interest finally resulted in a one-fourth interest.

Q. Is that all you and he did with the Eastern?

A. Of course the property—there was not enough to it—there was one time that Mr. Alexander Leggat wanted to collar it and he made a report on it, and that report was to include several claims then, and they consolidated them and tried to sell stock, and prior to that time we had offered it for sale—there had been many parties come to me and asked for a price on it, and I always said that Mr. Leggat, owning a one-fourth interest in the Eastern, that I would not put a price on it, and never did put a price on it. I always let him do the negotiating; quite a number of them came to me at different times and asked

(Testimony of Charles D. McLure.)

me to sell it, and I told them to go to Mr. Leggat, he has charge of it, and I won't put a price on it, owning a three-quarter interest and he owning a one-fourth, and our friendship had been such that I didn't feel like I would like to make a price on his property. Although I will say this, that if his price didn't suit me, I would have said no.

Q. Can you tell about when it was, and how long these transactions continued with reference to the Eastern?

A. Well, when the Butte & Superior came forward and was in that neighborhood and doing development work, so in that transaction parties approached Mr. Leggat to put a price on it, and the same with the Bland, and again on the Eastern, and the same on the Ouichita, and finally, under these negotiations, there was a proposition made by the Butte and Superior, which Mr. Leggat accepted. That is the date of that paper which [94—36] Mr. Sanders had here, the 1st of July, 1912, is when the deal was consummated.

I am not sure where I was while these negotiations were going on with reference to the Eastern, which finally culminated in a possibility of this deal being made with Wolvin and Hayes. I think when the first negotiations were taken up I was in St. Louis and was told to come to Montana, and I came here before the papers were signed, or about the time that paper was signed, either the day after or the day before it, I don't know which. Prior to this time the negotiations with these people that finally took over the property had been going on for over a

(Testimony of Charles D. McLure.)

year. I think I was kept advised of what was being done. I was kept advised by Mr. Leggat.

Q. Now, Mr. McLure, at this time, when the negotiations were pending, when the deal with the Butte & Superior people was about to be closed, was there any interest in any of the property standing in your mother's name that had to be straightened out?

A. When we came to go through the abstracts on this property, all these interests at one time had been placed in my mother's name, and my mother being dead, and the estate having been administered on—I want to say that there was nothing about these properties that she was interested in at all, and there was no living heirs but myself and my brothers and Mrs. Clark, my sister, and Mrs. Clark claimed an interest in the property. Finally she went to San Diego and my brother assured her that it was all wrong, that my mother didn't own any interest, and she deeded the property back to me.

There was some talk about having an administrator appointed for my mother's estate. Finally we got it [95—37] straightened out by Mrs. Clark making this deed declaring me to be the sole owner of the property, and that deed was sent to Mr. Leggat and put on record. He put it on record and that straightened up the title. It is a fact that an administrator was appointed for my mother's estate. Mr. Leggat was appointed. The deed having been put on record, and no administration they thought to straighten it up that an administrator ought to be appointed and Mr. Leggat was appointed. I be-



(Testimony of Charles D. McLure.)

lieve it was at my request, but it was to straighten out the title, and under the advice of the attorneys that was the best way to straighten it up. It probably was on my written request that Mr. Leggat was appointed; I am not familiar enough with it to say whether that was so or not. I mentioned the Granite property in connection with Mr. Leggat. He was not interested in that. After the deal had been made with the Butte & Superior people, or these two men, Wolvin & Hayes, that was consummated on the 1st day of July, I came to Butte after that. I came to Butte frequently. I was in Butte during the month of August, 1912. I think the option, there was thirty per cent of the total amount of the property bonded by me and Mr. Leggat. The Eastern was bonded for a total of two hundred thousand dollars, of which I had three-fourths, and a one-sixth in the Bland was bonded for thirty thousand dollars that I owned alone, and three-eighths in the Ouichita was bonded for twelve thousand dollars, and I think I got thirty per cent payments, one ten per cent and one twenty. That was all that was done on the contract, and finally they fell down on the last payment. They were all patented claims. My wife and I made a deed to that property and put it in escrow. That was after I had come to Montana, some time in August, [96—38] 1912; when I came here we took up the abstracts and found where the errors were corrected, or found where the errors were and corrected them by appointing an administrator for my

(Testimony of Charles D. McLure.)

mother, and then the deeds were made out for my part of the Eastern.

Mrs. McLure was not well prior to our coming to Montana for the purpose of making a deed and I believe the attorneys wanted a guardian appointed for my wife, and there was a proceeding in the court, Judge Donlan's court, I think, at Butte, and there were parties appointed to appraise the property and report on it. She had no interest in the property except her dower interest, that was all. This proceeding was for the purpose of getting some competent person to make a conveyance of her dower right in the property, she was quite ill at that time. Appraisers were appointed to appraise the value of her interest in the Eastern and the Ouichita. and the Bland. The appraisers were Rod D. Leggat, Dr. Reins and I think Charles S. Warren. They made an appraisal of these properties. I don't remember what they appraised the property at. I can't call it to mind as to the amounts. I can't recall the amount that her interest was appraised at.

Mr. RASCH.—We have here the original appraisal as filed in the District Court of Silver Bow County, and inasmuch as this is the original, we have had made a certified copy here which we would like to substitute for the original.

Mr. SCALLON.—We have no objection to that.

Mr. RASCH.—We will offer this certified copy of the appraisal in evidence and ask that it be made a part of the record and marked Plaintiff's Exhibit "D."

Plaintiff's Exhibit "D" received in evidence without objection, and is as follows:

**[Plaintiff's Exhibit "D"—Certified Copy of Appraisement.]**

[97—39] *"In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

In the Matter of the Estate of Mrs. CLARA EDGAR McLURE, an Insane and Mentally Incompetent Person.

**INVENTORY AND APPRAISEMENT.**

I, John J. Foley, Clerk of the District Court of the Second Judicial District of the State of Montana, do hereby certify that Rod D. Leggat, Charles S. Warren and John P. Reins were duly appointed appraisers of the estate of the above-named ward by order of the said court, duly entered and recorded on the 31st day of July, 1912.

WITNESS my hand and the seal of said court this 31st day of July, 1912.

(Court Seal)

JOHN J. FOLEY,  
Clerk.

By M. F. Sullivan,  
Deputy Clerk.

The State of Montana,  
County of Silver Bow,—ss.

**OATH OF APPRAISERS.**

Rod D. Leggat, Charles S. Warren and John P. Reins, duly appointed appraisers of the estate of Mrs. Clara Edgar McLure, an insane and mentally

incompetent person, being duly sworn, each for himself says: That he will truly, honestly and impartially appraise the property of said estate, which shall be exhibited to him, according to the best of his knowledge and ability.

ROD D. LEGGAT.

CHARLES S. WARREN.

JOHN P. REINS.

Subscribed and sworn to before me this 31st day of July, 1912.

JOHN L. TEMPLEMAN,

Notary Public for the State of Montana, Residing  
at Butte, Montana.

My commission expires August 14, 1914.

[98—40] The State of Montana,  
County of Silver Bow,—ss.

OATH OF GUARDIAN.

Charles D. McLure, the Guardian of the Estate of Mrs. Clara Edgar McLure, an insane and mentally incompetent person, being duly sworn, says: That the annexed inventory contains a true statement of all the estate of the said ward which has come to the knowledge and possession of this affiant, and particularly of all money belonging to the said ward, and of all just claims of the said ward against the said affiant.

CHARLES D. McLURE.



Subscribed and sworn to before me this 31st day of July, 1912.

JOHN L. TEMPLEMAN,  
Notary Public for the State of Montana, Residing at  
Butte, Montana.

My commission expires Aug. 14, 1914.

To compensation for services in appraising said estate.

No charge.

ROD D. LEGGAT.

JOHN P. REINS.

CHARLES S. WARREN.

(Title of Court and Cause.)

# INVENTORY AND APPRAISEMENT.

Moneys belong to the said ward, which have come to the hands of the guardian .....	\$	nil
---	----	-----

Personal property which has come into the hands of the guardian.....		none
---	--	------

Ward's inchoate right of dower in an undivided three-fourths interest in the Eastern quartz lode mining claim, being Lot No. 169, Sur. No. 1220, Summit Valley Mining District, Silver Bow County, Montana, said claim being unproductive, appraised in the sum of .....	\$25,000.00
--	-------------

[99—41] Ward inchoate right of dower in an undivided one-sixth interest in the Bland quartz lode mining claim, being lot No. 304, Sur. No. 1140, Summit Valley Mining District, Sil-

(Testimony of Charles D. McLure.)

ver Bow County, Montana, said claim  
being unproductive, appraised in the  
sum of.....\$12,500.00

Ward's inchoate right of dower in an un-  
divided three-eighths interest in the  
Ouichita quartz lode mining claim,  
being Lot No. 168, Sur. No. 1229,  
Summit Valley Mining District, Sil-  
ver Bow County, Montana; said claim  
being unproductive, appraised in  
the sum of..... 2,500.00

We, the undersigned, duly appointed appraisers  
of the estate of Mrs. Clara Edgar McLure, hereby  
certify that the property mentioned in the foregoing  
inventory has been exhibited to us, and that we ap-  
praise the same at the sum of forty thousand dol-  
lars (\$40,000 no/100).

ROD D. LEGGAT,

Appraiser.

CHARLES S. WARREN,

Appraiser.

JOHN P. REINS,

Appraiser.

Duly certified by John J. Foley, clerk, by J. F.  
Driscoll, Deputy.

Filed July 31, 1912. John J. Foley, Clerk. By J.  
F. O'Brien, Deputy."

The WITNESS.—I believe I stated with reference  
to many of these negotiations and these transactions  
between Mr. Leggat and myself when I was away

(Testimony of Charles D. McLure.)

from here, that I was kept advised by Mr. Leggat. I was kept advised by letters, correspondence, and sometimes by telephone, if I was in the country. I am familiar with Mr. Leggat's handwriting.

Q. I will ask you to look at this letter, dated "Butte City, Montana, April 2nd, 1889" and addressed to you at St. Louis, and I will get you to state in whose handwriting that is.

A. That is in Mr. Leggat's handwriting.

[100—42] Mr. RASCH.—I will offer this letter in evidence and ask that it be marked Plaintiff's Exhibit "E."

Letter received in evidence, without objection, and is as follows:

"Butte City, Mont., April 2d, 1889.

Chas. D. McLure, Esq.,

St. Louis, Mo.

My dear Sir:

You will please find herewith a lease on the Eastern Lode claim. On looking over it you will find that it fills the bill, as we agreed on while you were here.

Please sign it at your earliest convenience and return to me, as the parties have their machinery all ready to commence operations. I feel assured that they will develop the mine into a paying one.

Hoping to hear from you soon, I am

Yours truly,

ROD D. LEGGAT."

Q. I call your attention, Mr. McLure, to a letter dated Butte, Montana, February 2, 1905, addressed

(Testimony of Charles D. McLure.)

to you at St. Louis, and I will get you to tell us in whose handwriting that letter is.

A. That letter is signed by Rod D. Leggat and is in Mr. Leggat's handwriting.

Letter marked Plaintiff's Exhibit "F" and offered and received in evidence without objection and is as follows:

"Butte, Montana, Feb. 2, 1905.

Mr. C. D. McLure,

St. Louis, Mo.

My dear friend:

Yours of the 27th of Dec. came duly to hand, and I assure you I was glad to hear from you.

[101—43] I have been waiting to see what I could do in the way of leasing the Eastern and Elvina on the first. I have given a verbal lease to a couple of good men to prospect on the west end of the 'Eastern' and if they find anything I agree to give them a written lease for a year 25% royalty. There has never been anything found on the west-end of the claim, the soil being deep, but the men are tracing the vein very nicely and I do hope they get it good.

As to the Elvina most of the leasors are afraid of the water for it will take some capital to handle it and most of them lack that. There is a party that I am figuring with that has the means to handle it in good shape, but he knows nothing about mining himself. But if he goes into it he would want a bond on the property. This I told him would rest



with you. 'And that McLure was a hard proposition to either buy from or get a bond on anything he owned.'

I offered him a one or two year lease 25% royalty, shaft to be sunk additional 159 ft. 1st year, 75 ft. 1st six months in the 2d year or if the shaft was sunk 150 ft. the 1st year he would make the royalty 20%. I also offered to furnish the hoist, pumps and boilers, as you told me you had them over at Philipsburg, and I could be there. Really it will take pretty strong party to handle it for the water is very heavy in that section and they would have to pump all by themselves, for no other pumping is being done. It may fall through, but by making good inducements to him something might be done. Now, as to the bond they naturally would want one, so set what you think is the right figure, as well as any other stipulations or suggestions that you may wish done.

Hoping to hear from you soon and with best regards to you and yours, I am

Truly,

ROD D. LEGGAT."

[102—44] At this point plaintiff offered in evidence the following correspondence, which was testified by the witness, was in the handwriting and signed by the defendant Rod D. Leggat, and marked as exhibits and received in evidence without objection:

[Plaintiff's Exhibit "G"—Letter, Rod D. Leggat to  
C. D. McLure, April 19, 1905.]

"Butte, Montana, April 19, 1905.

Mr. C. D. McLure,

St Louis, Mo.

My dear Charlie:

There is a party here who is trying to get the following group of claims: 'Bland, Eastern, Deadwood, Jersey Blue,' and one or two other claims in that vicinity. They have got some of them bonded already and want the 'Eastern.' I told them I was willing to bond but would have to write you as to the amount that we would want for the property and it would have to be a short bond at that. So please let me know what figure you think we ought to ask for the Eastern claim. Now please don't neglect or postpone telling me what to do in regard to this matter, for I promised to give them our terms as soon as I hear from you.

I wrote to you as to the Elvina but never got an answer. I have offered good inducements to several lessees but they are all afraid of the water.

So do it now, for I do *live* to hear from you, even if it is only a telegram.

With very best wishes, I am, as ever

Truly yours, , ,

ROD D. LEGGAT."

[Plaintiff's Exhibit "H"—Letter, Rod D. Leggat to  
C. D. McLure, May 2, 1905.]

[103—45] "Butte Mont. May, 2, 1905.

Mr. C. D. McLure,  
St. Louis, Mo.

My dear Friend:

Yours of the 24 to hand and I see that you don't give me any explicit instructions as to what terms we ought to bond and lease the Eastern on.

The parties are willing to bond and lease for one year, 1st three months to keep at least 2 men sinking shaft. Not less than 24 days in each month. End of three months not less than four men sinking shaft for the same period (24 days each month). At the end of six months will pay 10% ten per cent on the amount of bond. All ore to remain on dump until the ten per cent is paid. Deeds to be placed in escrow at any bank you name and payment credited to the different interested parties or owners by the bank. Of course I can have put in any other safeguard or stipulation that you wish. I have not even intimated at what figure we held the claim at to them, but said that I would consult Mr. C. D. McLure of St. Louis and he was a tough one to buy from. Quick to buy but slow to sell.

My impression is that you own 1/2 interest in Eastern, T. Stewart White and myself the other half, still I am not sure. My deeds are in bank vault. Will look it up. You should have abstract, for years ago I sent you one.

I think sixty thousand to seventy-five would be about right for I would like to take now for my interest at the rate of 25 or 30,000 per claim.

As to what your interest is in the Bland, I think it [104—46] is a one-fourth. Warren and Curtis is also interested *in with* you. I had merely stated to the parties that you owned in that claim as we passed over it, but nothing further has been done, as they are looking farther east and have left out the Jersey Blue. There is no work being done in the vicinity. The nearest is at the Black Rock south-east of the Eastern.

As the parties want to go east to see what they can do, I wish you would give me the figures that we ought to put on the Eastern. Please telegraph the amount and any stipulation that you want, for I don't want to lose an opportunity to have some work done and possibly a deal.

So expecting to hear from you at your earliest, with regards and best wishes,

I am truly,

ROD D. LEGGET."

**[Plaintiff's Exhibit "I"—Letter, Rod D. Leggat to C. D. McLure, June 9, 1905.]**

"Butte, Montana, Jun. 9, 1905.

Mr. C. D. McLure,

St Louis, Mo.

My dear Friend:

You will please find proxy for the Combination Mining and Milling Co. meeting which I signed.

As to the Eastern claim will say that I think it is



for a new Co. that the promoters are figuring to get interested. The Alice Mining Co. has nothing to do with it. The Quilp Enterprise Narrow Gauge 'Deadwood and Damarat' have been bonded to the parties that want the Eastern. The price on those different claims running from 40,000.00 to 75,000.00. I put the price on Eastern at 110,000.00 ten per cent to be paid in six months, bal. in one year.

In looking over the records I find they show as follows as to the interest.

[105—47]	C. D. McLure	7/12
	Margaret McLure	1/6
	R. D. Leggat	1/8
	T. Stewart White	1/8

I am getting an abstract out but the interest stands as above. So you had better look up the deed from your mother for I think you once told me she had deeded to you. For this interest is now in bad shape and we can do nothing as to making the deal until I hear from you. Hoping that you will attend to this matter as well as giving me any further instructions as to what you want in the agreement, provided I can now make one, so that one-sixth interest should be straightened out at once.

Please let me know about what time you will be out for I may have to go to Idaho, but I will not go until you come.

You have some stock in the Combination M. & M. Co. that should be transferred to me.

L. M. Foster died at Los Angeles, Cal., yesterday,

result of stroke of apoplexy. Very sudden. Buried on Thursday.

Hoping you are well and that you will write soon,  
I am as ever

ROD D. LEGGAT."

**[Plaintiff's Exhibit "J"—Letter, Rod D. Leggat to  
Charles D. McLure, January 15, 1906.]**

"Butte, Montana, Jany. 15, 1906.

Mr. Charles D. McLure,  
St. Louis, Mo.

My dear Charlie:

I have leased the Elvina Lode claim for the term of two years on the following conditions: 25% royalty to lessor. No ore to be removed from dump without getting consent of lessor. The lessees are to take the water out and put the mine in good shape. In four months from date are to commence to sink the [106—48] shaft 150 deeper and keep at the said sinking continuously until completed. Shaft to be the same size and dimension as the present shafts.

In fact I have drawn up an "Iron Clad" lease. The parties want also a bond. This I promised them, but said I would have to consult with you as to the figures. They are very anxious to get right to work and it will take some time for them to get their machinery in place, and I know getting the water out of the mine is a big undertaking.

In your last you expected to leave for Idaho so have not much hope of this reaching you, but thought I would try it.

Will write by this mail to Jesse B. to find out

where you are and if you will come here ere long,  
for I long to see you.

Yours very truly,

ROD D. LEGGAT."

[Plaintiff's Exhibit "K"—Letter, Rod D. Leggat to  
"Charlie," February 4, 1906.]

"Butte, Montana, Feb. 4, 1906.

My dear Charlie:

Your photograph came in splendid condition this evening, and we are all very much pleased to get it. Wife and Stewart wants it framed right off, so I expect it will be placed in the most conspicuous position in the house. It really is a very good one of you and resembles very much the last 'Lord Provost' of Edenboro, that I had the honor of meeting, so there. I met Warren today, said he wanted your address, which I gave him. He then said he could sell the "Bland" lode claim for \$100,000 and get all the money down in 30 days, so if he wasn't lying you should get a letter with this mail from him, for he talks of [107—49] millions now as I do of pennies. The boys have got their 40 H. P. boiler to the Elvina (blk. smith) and they are expected home in about ten days. The Largey estate mining expert, Mr. McHugh, asked me yesterday if Mc C. White had a bond on the Eastern and told him no, but that he wanted it and I had only a short time ago got you to consent to terms, had written McC that I could not hold you long for other parties were after it from you. He wanted me to make the bond right out and get you to sign it for they wanted it. This shows to me that Largey & White is together in a syndicate.

Told him I had given McC the terms which would be held good until I heard from him, after that I could not answer for you. So you see I put the whole responsibility on C. D. Mc. Hope you will stand it. Got a letter from J. A. Coram from Waldorf-Astoria, New York, head of American Consolidated Coffee Co., begging me to give him more time on a big lumber proposition that is before him. I wired him to-day that he would have to put up 10,000 before the 15th of this month, and I would hold the offer to the 1st of May for him. The proposition is a very important thing for his Co. and he knows it. Rather think I will go a deal.

Hoping you are in the best of health and easy in mind, I am,

Truly,

ROD D. LEGGAT."

**[Plaintiff's Exhibit "L"—Letter, Rod D. Leggat to C. D. McLure, March 30, 1906.]**

[108—50] "Butte, Montana, Mar. 30th, 1906.

Mr. C. D. McLure,

St. Louis, Mo.

My dear Charlie:

I ordered abstract to be made of Ouichita Lode claim and Mr. Simmons, the abstractor, of the Amalgamated Co. will send it to you as soon as it is finished. I got the interests from him and the title stands as follows:

Chas. D. McLure, 6/16

P. M. O'Donnell, 3/16

Silas T. King 4/16

and Sweeny 3/16

16/16



I have to start for Idaho to-night, so drop this to you as I don't know when I will be back here.

It looks as if those parties that want your claim are in earnest as they told me they had reported favorably after I went over the different claims with them. I do hope that favorable deals can be made with them.

Mr. Haynes told me that it was with a banker at Boston who had a syndicate that was ready to put up on a group of *of* claims on a favorable report from Mr. People, who is the chief assayer of the Amalgamated. Peoples is from Denver and Colorado School of Mines. They will write you.

A Mr. Andrew Quiltz, who was the foreman for Millard at Virginia and an old miner here, came to see me to see if you would give a lease on your Ipox claim at Virginia. Thinks he could make it pay. He now is working on a lease here. He is a good miner. I told him I would write you. He might be useful to you, so write me or to him. Quiltz, care of Joseph Carney, c/o County Treasury Office, Butte, Mont.

With best wishes and hoping for a sure, good, quick deal, [109—51] I am truly yours,

ROD D. LEGGAT."

**[Plaintiff's Exhibit "M"—Letter, Rod D. Leggat to  
"Good Old Friend," July 16, 1906.]**

"Butte, Montana, July 16, 1906.

My dear Good Old Friend:

Got your short note today and was very much pleased to hear from you. Glad that you are thinking of bringing some of the 'Clan McLure' with you,

for their ancestors always thrived in the 'Hieland' and it is the place of freedom for them.

Please let me know about what time you will be here, for I may have to make a short trip to Idaho, but don't want to miss you and the boys, so will await word from you. I am in splendid condition and do hope you are likewise.

With best love and wishes

I am as ever,

ROD D. LEGGAT."

[**Plaintiff's Exhibit "N"—Letter, Rod D. Leggat to Charles D. McLure, November 29, 1906.]**

"Butte, Montana, Nov. 29, 1906.

Mr. Charles D. McLure,  
St. Louis, Mo.

My dear Friend:

Yours of the 26th just reached me this 'Thanksgiving' noon day. Am glad that you reached home without any accident, even if you were several hours late. Mr. Wilmot and myself went all over the Eastern, Bland, Ouichita, as well as over the Ready Cash of Driscols. He seemed rather pleased with the group and outlook. I gave him the figures of all the interests you held and also got Dennis Driscol's figures [110—52] on the 'Ready Cash,' which he wanted me to get for him, and would report to Mr. Channing and the Lewisohns at once. He told me that a party had tied up a group of claims north of the Pollock and south of the Colleen Bawn and had gone to New York to place them before the company there. On going over our group to the different offerings I saw that he had been to some of them be-

fore, and not knowing the corner, missed important points, which he admitted he had. I gave him no option or time, but told him your terms as we agreed on. Did not have time to go to the Elvina that day, but he spoke of it, and told him of Col. Hart and Adams report, which he is very anxious to see, for wanted to know if we would give him time to pump the water out and time to inspect the workings.

So please send Hart & Adams report on the Elvina at once. I rather thought you would have sent it as soon as you got to your office, as you said you would send it as soon as you got it.

I will keep you advised of anything that comes up either by wire or letter.

People have went wild on the Barnes-King stocks. (See papers.)

My wife is still pretty bad. Is some better since you left, for I am at home nights now.

Sam Houser's wife dropped dead in California Tuesday last.

With best wishes and regards, I am truly

ROD D. LEGGAT."

[Plaintiff's Exhibit "O"—Letter, Rod D. Leggat to  
C. D. McLure.]

[111—53] "Mr. C. D. McLure,

St. Louis, Mo.

My dear Charlie:

I have been looking for you and the boys here ever since the middle of last month. Why don't you come, for I want so much to see you, for it does me lots of good to see your jolly large provost figure around.

I enclose copy of letter from a mining engineer just received from a new camp in Nevada. I have written him for further information and may go. Can you make the trip with me? Only 25 miles from R. R.

Hoping to hear from you at once

I am truly yours,

ROD D. LEGGAT."

Enclosure.

**[Plaintiff's Exhibit "P"—Letter, Rod D. Leggat to  
"My Dear Friend," June 7, 1907.]**

"Butte, Montana, June 7, 1907.

My dear Friend:

I just got yours of the 4th so will drop you a line and get it in mail on to-night's train and it will reach you by the 10th.

I will go to Great Falls on the morning train on Monday, the 10th, so as to be there sure on the 11th.

I thought that Will Parkinson might come this way so we could go together. I will keep a lookout for him.

I thoroughly understand the situation, and how Ford, and I guess others, have tried to steal and do you wrong. I've got no use for a faithless or ungrateful wretch of a man, and what I can do to make them do square and straight in all things shall be done by me. I presume you have written to your [112—54] confidential friend there, so I will not be at Sea. Will say that all of this matter is strictly confidential with me and no one knows that I am going on the trip. Wire me at the Falls if necessary.



I will wire you with this so you will know that I will be there.

With best regards and wishes,

I am as every truly,

ROD D. LEGGAT."

**[Plaintiff's Exhibit "Q"—Letter, Rod D. Leggat to  
"Charlie," October 15, 1907.]**

"Butte, Montana, Oct. 15, 1907.

My dear true old friend Charlie:

I got your telegram and things are all right. A short time ago Genl. Warren hailed me on the street and showed a telegram from you as follows: 'A leopard can change its spots but I cannot. See Rod D. Leggat. Signed C. D. McL.' Well it was a burner, but he deserved it for he long knew what your figures were and agreed to it with me, and the next day gave a bond to an irresponsible party for his 1/2 interest at the rate for full claim for 100,000 and then did not tell me. To-day I told him your price was 150,000.00 and he had long been aware of that fact for McLure did not change like a chameleon.

He wrote to Argyle, but he will stand at your figure. Will at least communicate with me, so feel easy. You are a holdfast, good and true. Good Scotch blood in one's veins tells of the stock they spring from.

Things are quiet here as your letter anticipated. You really struck them correct, and I fully agree with you that shot guns should be in order, but a better treatment would [113—55] be like the Sepoy strapped to the cannon's mouth by British in India.

I do hope self and family are now in good health. Is there any hope of you coming out this year? Let me know.

Yours truly,

ROD D. LEGGAT."

**[Plaintiff's Exhibit "R"—Letter, Rod D. Leggat to  
C. D. McLure, October 18, 1907.]**

"Butte, Montana, Oct. 18, 1907.

Mr. C. D. McLure,

St. Louis, Mo.

My dear Charlie:

Yours of the 14 and 15 to hand and I will say that in the main you sized things up correctly, or I think you do. I saw Warren to-day, previous to receiving your letters. He had just got your letter which he handed me to read. He also had a telegram from J. T. Argyle to him stating that he, Argyle, would agree to the price offered for the Bland. So Argyle is willing to sell at that figure. While here he agreed to the 150,000 figure, for I took him up to the claim, so he's just gone back on his agreement, that's all. Now in yours of the 14 you leave it to my judgment to sell and let them develop the Bland. Now Charlie, this rather puts me in a position of an adviser as to what you should do with your own. Your interest in the Bland is 2/12. As Argyle wants to sell as well as Warren, why not do it, for as things look here at present I consider it a big price. To tell you what I really believe, I don't think that this fellow Nickry or his Co. can pay 80,000 in sixty or two hundred days. In my opinion it is just bosh for things here are extremely gloomy and will continue

so for a long while. Remember that a 'half loaf is [114—56] better than no bread.'

The State Savings Bank did not open their doors yesterday, and to-day the State Examiner has possession. I think the bank is solvent, but it is rather hard to get caught with only a few dollars, as pocket money, really just a five, and not knowing when I can get any more, so you see that I am not over happy or of a sweet disposition at the present time. Just think of over 4,000,000.00 in deposits being tied up for God knows how long. If I had five hundred in the house I would be happy just at this—but enough of my cares and worries.

I really think if there could be a legitimate sale of your interest in Bland, I advise you to let go.

Hoping that you are feeling much better than I am,

I am truly,

ROD D. LEGGAT."

**[Plaintiff's Exhibit "S"—Letter, Rod D. Leggat to "Charlie" October 24, 1907.]**

"Butte, Montana, Oct. 24, 1907.

My Dear Good True Charlie:

I have received your many good letters, also the clippings and many thanks for the same. When I say that I have deeply considered and acted on them as far as I could, you really and truly hit the situation, for now the fates have proved your warning made a long while ago. The Barnes-King robbery or stealing did not affect me one dollar, only through some of my friends whom I am extremely sorry for. My opinion is that there will be no expose, for those who could and wish to do the investigating do not do

it for others have a string on them and they can't move. As to the Ross Tweed & Clipper deal, will say that Walter Harvey Weed had not a thing to do with it, and to my certain knowledge it was Will [115—57] Word, John Gillie, W. S. Thornton, Jim Forbis and John Berkins. This I got at the time direct from Billy Morris, and the amount he had to give up to each.

In my last I stated that I thought the State Savings Bank was solvent, but there has always been a banking enviousness or jealousy from other banks here towards it, and no straight out Amalgamated firm or man ever talked friendly for it. It would be like this. It would be like this. 'Well I hope so,' but then a doubt, so a poor depositor would be in despair.

Tell you the truth, I have no use for a sneek or wishy washy man, or one that wants to crowd the the under dog. I guess you and I are alike in that. A square deal and for the weak always, if they are right. Nothing have I heard from Warren's man Nickey, so I guess you put it up right.

Hoping to hear from you often and with best wishes,

I am truly

ROD D. LEGGAT.

Is St. Louis affected by the troubles in New York?  
I hope not."



**[Plaintiff's Exhibit "T"—Letter, Rod D. Leggat to  
C. D. McLure, May 7, 1908.]**

“Butte, Montana, May 7th, 1908.

Mr. C. D. McLure,  
St Louis, Mo.

My dear Charlie:

I got back from Idaho a few days ago. Won my suit at Lewiston to quiet title and partition of property (group of six quartz claims). I commenced this suit on your advice so you have my thanks for the solid advice you gave me.

I just got a letter from my nephew Alexander Leggat [116—58] who is in Ohio, and have written him to return by the way of St Louis to call on you so you can consult together concerning the Eastern, Ottawa, Deadwood and other claims that we can get together into a group. He will have maps and plats and knows every foot of those claims and that section of the camp and has all the dates to give you, we have to have an engineer or one to plat or map these properties who has a good head as well as having a good claim himself. That will help to make a fine group for some live man or men to handle. Dennis Driscoll will join us with the Ready Cash claim and we can get the Meighan in. Well, just sift the boy thoroughly both inside and out and then decide on what we shall or will be willing to do. I believe in the grouping of these claims and to do it now.

Mr. Fusz told me that Mrs. McLure was in bad health, which I am extremely sorry to hear. I do

hope that ere this she has improved for I know her illness is a great strain on you.

Hoping to hear from you soon and with best wishes and love,

I am very truly yours,

ROD D. LEGGAT"

[Plaintiff's Exhibit "U"—Letter, Rod D. Leggat to  
C. D. McLure, January 29, 1908.]

"Butte, Montana, Jany. 29, 1908.

Mr. C. D. McLure,

St Louis, Mo.

My dear Charlie:

You will find herein map of the North Butte Camp. All of the claims marked in red might be tied up, but action must be quick.

[117—59] You will also find preliminary report of Mr. Leggat, who for the last two years has been extremely familiar with the above section. I hurry to get this off, for in yours of the 25 you wanted some data, but when you remember that 20 years ago it was the custom of 'High Graders' to go for everything in sight, both ore and stripping all the timber off of one's claims. So if there is any prospect of floating our prospects let me know, for I don't want to bind anyone up unless there is reasonable chance of a deal honestly carried out.

You now have the maps and you know the section as well as any man. In fact much better.

Hoping to hear from you soon, for your two last letters lead me to believe that you see the oppor-

tunity of this great property.

Yours truly,

ROD D. LEGGAT.

“Butte, Montana, 5/6 1906.

Send clipping enclosed herein.”

[**Plaintiff's Exhibit “V”—Letter Rod D. Leggat to  
C. D. McLure—July 6, 1906.]**

Mr. C. D. McLure,

St Louis, Mo.

My dear Charlie:

I got here on night of the 3d. since which time I have been very busy attending to some matters that needed my attention as well as paying some attention to *Mr.* Leggat, for she has really been a very sick woman and is not well yet, but is much better than she had been for the last month.

Your letters have been received and I strictly obeyed instructions therein concerning the Eastern talked of deal. Met Mr. Riley and told him that I met Mr. Haines on street, but [118—60] did not talk deal, for your letter had posted me ere I met him. Did not see him since until I met him at Post Office today. He told me he looked for his people here either to-night or to-morrow night, for they were to leave Boston Wednesday last. Still he did not know that positively as he had not heard direct from them himself, so you see that any deal is really very uncertain, for I for one can't learn their names or financial position. You state that they have paid cash for some interest and have stocked and are underwritten by strong parties. I rather doubt this,

for I surely would get on to this if it was a fact. The consolidation that my nephew Alexander showed you the plat of has fallen down on account of two many interests to handle. This I know and Dr. Reins, who owns heavily in the Deadwood, has given a verbal offer to Mr. Haines for his interest in "Deadwood" as well as J. F. Forbis on the 'Mamie' and P. J. Brophy on the 'Woodin.' Haines told this to me at Post Office to-day. I haven't got much faith in any deal being made, but you can rest assured I will be in full accord with what you do and will not interfere in the transaction, only I put the figure at 200,000 to these parties with your sanction and would not like to have it put higher, for I like to have my promises kept better than my bond.

As I leave for Idaho night of the 7th, provided my wife is in condition for me to go, if the Boston parties come I will not see them unless it is absolutely necessary and they send for me. Then I shall give the figure we ask for the property and refer all details on consummation of the deal to you alone 'for sometimes too many cooks spoil the broth.' Whatever you do suits me and I can answer for T. Stewart White, for it is right when many are included for one to do the business.

[119—61]. I received the within letter to-day, which speaks for itself (attempt to graft) so called on the attorney to see what it meant. He stated that Weller claimed that you had refused as well as myself to give a written consent to assign the lease to Spokane parties as well as misrepresenting the



property. I wrote my friend Loodsy feels that the leasee never lived up to a single stipulation in the least and that Mr. Dixon same to my house and gave up the property and said that he would get the papers and surrender them, as he could not get any one with capital to back them and had gone himself to work on the Ophir claim. I did not tell any too much as this fellow Weller is impecunious and has no fee to pay a lawyer, only a contingent one of black money. I don't think any reputable attorney will take it up, even if any one did nothing can come of it only to annoy us a little.

As to my Alaska troubles will say that after my attorneys went all over papers I have they counsel that I tie up escrow deeds and contract in bank, for I am entitled to one-half without a question of the escrow; really should have two-thirds of it, so it may be that I will have to go to Oregon to commence suit, which I don't want to do. As I have plenty of time to do it will consider it for a while. If anything comes up to-morrow before I leave will let you know.

With best regards

I am truly

ROD D. LEGGAT.

I have an abstract of title to the Elvina which you can have at any time."

[Plaintiff's Exhibit "W"—Letter, Rod D. Leggat to  
"Charlie," January 5, 1906.]

[120—62] "Butte, Montana, Jany. 5, 1906.

My dear Charlie:

Yours of the 2d with the New Years Greetings is to hand. I assure you that I sincerely appreciate the knowledge that you sometimes think of your old friend, which I do often of mine.

Wallace Mc C. White left for New York last night. He wanted to bond the Eastern claim and in four months pay 10% of the bond, bal. in a year. I put the figure at two hundred thousand doll. (200,000.00) provided you were willing, but as you are at times so uncertain I did not dare to bind myself. He wanted, if possible, for me to get the bond at that figure and send it to his address in New York at once. He is a bright, smart fellow and I think means business, so it is up to you.

There is no development in that vicinity at present. On the 'Berlin' or the 'Old Bow K' group they are still sinking, but are not on the ledge yet.

The town is wild on the copper stocks and any old thing will sell that is stocked. The Raven is now selling at 6.50. Could buy last week at 1 and 1.50 (Raven and Snoozer claims at Centerville).

Now as you are going to the Stanley Basin section, take my advice and go prepared for a rough trip, for I have been there. I really am afraid to have two old fissils make the trip alone. Got a good

mine to see you and see that you get through all right.

Let me know when you will be here. Also when Mr. Frusy will be out. Hoping to see you soon and that the New Year will be a happy and most prosperous one for you and yours,

Sincerely yours,

ROD D. LEGGAT.

[Plaintiff's Exhibit "X"—Letter, Rod D. Leggatt to  
C. D. McLure, February 22, 1906.]

[121—63] "Butte, Montana, Feb, 22d, 1906.

Mr. C. D. McLure,

St Louis, Mo.

My dear Charlie:

Yours of the 17th recd. and a mighty good summing up of the situation here it is. You are right in the main drive, but off your base as to the future as to Heinze. Am satisfied that Hodgens, Largey, Mc C. White Syndicate with Heinze will make a combination with Coram American Copper Co., which would be a great consolidation. I got letter from J. A. Coram dated at Boston and he will be here Monday next. I have got a big lumber or timber situation ties up and he wants it bad for *his* Co. and frankly wired as well as wrote me, so you want to remember that I always have one alley that I don't get down it.'

Have not heard a word from *Mc White* since I wrote him, nor have any of those that are connected with him closely. Will write him to-night so that we can be at liberty to deal with other parties.

I was up to the Elvina this morning. They have a good boiler and hoist up and have been tanking water out. They are running 3, 8 hour shifts. Started up Monday tanking water. Have got the water down just to the roof of the 100 level. Tank hold 350 galls. and the whole outfit is good. They want to clean out and see how the 100 level looks. I think by Sunday that I will be able to examine it myself. They have got the boiler and hoist enclosed, but will not enclose the shaft or frame, as they all now here leave shaft in the open.

'Old Tom' was here for four or five days. Was very mysterious and secretive, but like all his doings I could see his 'tracks' for ten miles. After some claims just north of [122—64] the 'Columbia Gardins' and at last had to come to me to get proper information. He told me he would be back from Helena in a few days. I don't know who he is acting for, but I hope on this matter not for you. Strange fellow. Never knew him to get a single claim individually, but always had to have someone behind him. Not a leader but a follower. Send clipping enclosed. A party by the name of J. O. Cooper, heavy weight, is here wanting to get further time on a bond on a group of copper claims that I own, individually, near Atlin, B. C. He brought some very nice copper ore and it looks as if sometime in the future I might be able to rub elbows with Big Bugs. I never saw this property, so I guess I will have to take a trip up there this summer. It is about 40 miles from the Conrad, that I am interested in and told you about. Can't you arrange to take the trip



with me. All or most of it is by water and an elegant trip.

Hoping to receive more of your good, sound letters,  
I am most sincerely yours,

ROD D. LEGGAT.

Did you find Adams and Harts report on the Elvina? You told Dixon you would send it. They have asked me several times, so if you have got it, send it to me."

**[Plaintiff's Exhibit "Y"—Letter, Rod D. Leggat to  
"Charlie," March 3, 1908.]**

"Butte, Montana, Mar. 3d, 1908.

My dear Charlie:

Wrote you last night and got yours of the 29th. Am extremely glad to know that you got deed from the U. S. Marshall for the Diamond R. property, for you only fought for what was just and your due. Don't worry as to Ford, for he would beat a saint without any compunction of conscience.

[123—65] It seems strange that you should take such a Scottish name as 'Benvenue' for your Co., for this high mountain looked down from the south on 'Loch Katrine' the home of the 'Lady of the Lake,' one of Sir Walter Scott's poems, and I am 'Roderick Dhu.' Just read Scott again and you will see I am right.

I enclose clipping so you will see that the right won.

With best love, I am truly,

ROD D. LEGGAT."

[Plaintiff's Exhibit "Z"—Letter, Rod D. Leggat to  
C. D. McLure, December 9, 1906.]

"Butte, Montana, Dec. 9th, 1906.

Mr. C. D. McLure,  
St. Louis, Mo.

My dear Friend:

Yours of the 3d and 5th to hand. As to the proposition of the Elvina and boiler that you would furnish for the purpose of unwatering the mine, I made the proposition to Mr. Wilmot; also showed him J. C Adams report. He looks favorable as to it, but he is waiting for orders to go to New York to consult with Channing and his Co. people. He took down notes of all the information that I gave him. I guaranteed with a good pump and tank he could unwater the mine in two weeks, which can be done. He had reported on the Eastern group but got a wire to arrange to leave for New York about the 15th or on further instructions, which he looks for daily.

I would like awfully well if we could get such a strong reliable company as the Lewisohn Assn. to take hold of either properties. Wilmot has taken a lease from the South Butte Mining Co., which means the Great Northern R. R., on what is called the Jones Placer and is sinking a shaft a little west [124—66] of the Parrot Smelter and already has his machinery up and in place. Be a pusher and if we can make a trade with him there will be no delay in him getting at work quickly.

He will put both Eastern and Elvina properties up

to his people in person. He says that he will not be in New York over three days. I do wish that a deal could be made with the right people. There are plenty of men that Micawber like are looking for something to 'turn to' who want to tie the Eastern up, but we want none of these. Therefore at times I think we may be too exacting on terms.

I got a wire from P. A. F. in answer to one I sent you, authorizing me to raise the bid on Deadwood 1/6 interest, which I done yesterday morning, to fifteen hundred. This was a raise of 50%. The law is a raise of, or in writing bid of, 10% over the bid made at sale of property has to be considered by Probate Court. Sometimes it *does cover* the expense of a new sale and is not considered by court. So to make it more binding I put it high enough. Court can either confirm my bid or order a new sale now. Certainly next court will decide.

As to the Monticello Hotel, I will see what I can do in getting a buyer. I wish you would let me know how many rooms and stores it contains or No. of rooms, buffet and back rooms each compartment contains. Or have you a plan of the different stores, which would be better to send me, as well as the frontage and depth of building.

Am really glad that you are willing to sell this property, for it has been a 'White Elephant' on your hands for years. Not even a small interest on the investment to you. All ate up in taxes and pretended improvements. Why, as my wife tells me at times, I am an Easy Mark. I guess there are others.

[125—67] I will keep you advised of anything

that will be to your advantage, and hoping to hear often from you,

I am truly,

ROD D. LEGGAT.

Quite a number of the new members of the Legislature tell me that the Monticello is full for they have tried to get apartments there. L. A. Walker of the Finlen Hotel tried to get apartments there for wife, daughter and self weeks ago, but could not."

**[Plaintiff's Exhibit 1—Letter, Rod D. Leggat to C. D. McLure, August 24, 1909.]**

"Butte, Montana, Aug. 24, 1909.

Mr. C. D. McLure,

St. Louis, Mo.

My dear Old Time Friend:

Your letter of the 16th came some time ago, but I had to make a trip to Cataract district to look over a group I have there, so delayed writing. I enclose letter that I received from Colorado Springs, which I could not answer for the reason that I never heard a word from you in reply to a wire as well as a letter concerning the proposition and kept silent.

As to the talk James Breen had with me concerning purchasing Dyke property of yours, he stated he would give 100,000.00 dollars for it at 18 months time. I told him that I did not think you would entertain such a proposition, but I thought if he went to St. Louis and saw you in person and meant business that a deal could be made on reasonable terms. I did not think much of the conversation at the time, and only thought of it just as Mr. Frusy got into a carriage to



take a train, and then told him to tell you I meant no harm. I [126—68] learn that the Largeys as well as Heinze and Breen are interested in that section. I am inclined to believe that Heinze will come out all to the good in the long run, for he is resourceful and a fighter. 'Dog eat dog,' but my sympathy is always with the under dog in the fight. Can't help it. It's born in me.

I do wish that you would send your boys out here to me to spend their vacation, for I would have had Stewart and them go with me camping, and have gone and shown them all of your properties in Montana, which I think they should see and know of. It would have done them lots of good and Park is now old enough to relieve you of many a care if you only give him a chance. So next year send them out here to me.

The Butte and Superior as well as the Elm Orlu are still sinking and both look well. There is no doubt of them both being great mines. No other developments are being made in that section at present.

The Colorado is a big mine. It belongs to the Davis Daly Co. and that stock will go up sure.

I look for a party of my old friends who are now in Oregon and Washington looking over their timber holdings to meet me at Spokane or Lewiston, from where I will take them into the Clearwater country in Idaho just to give them a rough trip. Would just like to have you along so you could get a good whiff of mountain free air.

My wife and Stewart joins with me in best regards,

Yours very truly,

ROD D. LEGGAT."

**[Plaintiff's Exhibit 2—Letter, Rod D. Leggat, to  
C. D. McLure, July 6, 1909.]**

[127—69] "Butte, Montana, July 6, 1909.

Mr. C. D. McLure,

St. Louis, Mo.

My dear Charlie:

On my return from Idaho (where I had been with a surveyor to survey a group of quartz claims for patents for over two weeks) I found yours of the 29th, which I was extremely glad to get, for your copy of letter to him (Alex) expressed my views exactly. He had written to me at Elk City wanting me to wire you at once to sanction a deal with parties that we know nothing of. All of which I did not do. It's all right to act quick and with despatch with parties of standing that you know, but not with boomers or middlemen. The old Scotch adage is good for then just 'bide your time' which you can do to the 'Queen's taste.'

The first information of the proposed deal was a letter received from Alex on the 1st at Elk City on the eve of starting for Butte. He has shown me letters from the parties from Duluth that reads well. They want 20% as promoters. All this I suppose he will write to you. One thing I am not in favor of, trying to get too many claims at present into a corporation.

The Eastern, Ouichita, Bland, Ready Cash, with

the Right Bower, which I have the assurance from W. A. Clark that I can get his as well as Mrs. Joe K. Clark's interest in. Jesse L. Roy of St. Louis owns  $\frac{1}{6}$  of it and the Estate of Lee W. Foster  $\frac{1}{6}$ . The latter interest I can get also.

I am sorry that I was not here when parties were for I am a pretty fair sifter of men myself. That Mr. Wilmot that you met here is up from Salt Lake where he is now located [128—70] and is very anxious to look at your Henderson property. A year or so ago I had told him about it while traveling with him and he appears to have remembered it. It may be that I will take him over. If so I will report to you as to how your custodian is looking after your property, and if Wilmot wants to make a deal will send him direct to you to do it.

I do sincerely hope that Mrs. McLure has improved since her return to St. Louis. I expect you have all the boys with you at least during their vacations, which will be a great pleasure for you.

With best and most sincere love and regards,

I am truly

ROD D. LEGGAT."

[Plaintiff's Exhibit 3—Letter, Rod D. Leggat to  
C. D. McLure.]

"Mr. C. D. McLure,

St. Louis, Mo.

Dear Sir:

Mr. Germain (party that bought your mill at Hailey) just came here from Midas, Nevada, and has just left me. He wanted an extension on note and

mortgage that you hold for three months. I told him that I had not a thing to do with it and could not say what you would do as to an extension, as I had no power to do so. Told him to write you, which I suppose he will do at once.

He told me that it has been continually raining in Nevada for the last month and that he has been tied up by having his boilers and corrugated iron for roofing for mill at Elcho and not able to haul them to property on account of the fearful condition of the roads. He said that when he got the mill running he could easily clear five thousand dollars [129—71] a month. *He* mill man is a fellow that you had at Neihart by the name of McCall, you know him. He also has a man by the name of Masters who is a millwright and has worked for you and I understand both of them understand their business.

He said he had recorded the mortgage in the county and state where mill is and had returned it to bank at Hailey to be sent to you. I told him to write you fully, but nothing but facts, so I expect you will have typewritten letter full of woes. I am rather inclined to think that A. T. Morgan here is somewhat interested with him.

I have seen parties from Nevada and there is no doubt as to the utmost continually stormy weather. They have been having it in that section for over a month.

I want to get this letter off this mail so with best wishes,

I am as ever truly

ROD D. LEGGAT."



[130—72] [Plaintiff's Exhibit 4—Letter, Rod D. Leggat to "Charlie," January 26, 1907.]

"Butte, Montana, Jany. 26th, 1907.

My dear Charlie:

Yours of the 22d to hand, so I hasten to give you my ideas as to what I think the different claims can be bonded at for 18 months, if done now. Dennis Driscoll is anxious for me to try to do something with the Ready Cash in conjunction with Eastern and Bland. Have made no direct proposition to him, but think I could get it at about 60,000, 10% six months and possibly get him to take stock for the balance. If in the hands of a strong company that was able to sink 1000 or 1500 feet shaft say, on the Eastern and crosscut to the Ready Cash (just will say that on Thursday he bought 600 shares of the Butte & Superior in New York at one and three-quarters, so he has got faith in that vicinity) I honestly believe that if I had the cash that I could buy Warren's  $\frac{1}{2}$  interest in the Bland for 10,000, for he is extremely hard pressed and has to have money; mighty expensive man himself and formerly much more so. As to bonding the Bland; you would have to make a pretended bond first or we could not get him; or might be better to consent to any reasonable figure and terms. You know you held it high at 150,000 and they all know that. Think at 80 or 100,000, 10% cash in six months and bond for 18 months, I can get them to take all or at least  $\frac{1}{2}$  in stock. The Ouichita is a fraction and I think Solas King would bond the same as you, 40,000 or less. The Eastern

figure must be cut down from what we held it at, to get the other claims at a proper figure. This you will readily see.

The Ray-McKee own  $\frac{1}{4}$  interest in the Right Bower, and W. A. Clark the other  $\frac{3}{4}$ . Clark told me a year ago that he [131—73] would consider a proposition as to that claim, but I did not follow it up. The Deadwood, largest interest owned by Dr. Reins, was once bonded for 80,000, but not taken. This is the time to act, for times are very hard and better terms can be made. I saw Wilmot, Supt. for Lewisohn, and talked our group up. He said that parties put the Bland, Ready Cash and other claims west of the Bland, up to the Lewisohn main office in New York two years ago and showed me the report that they sent him from the main office. I told him that the Bland could not have been in, for you never gave a bond on it, nor did Driscoll on Ready Cash; some fakir, no doubt. They are not working on the Granite Mountain now.

The Butte & Superior are getting their ore at the 500 ft. level east of shaft. Ledge 15 feet wide; silver and gold and 1 to 2% copper; still sinking shaft which is 700 feet deep. The Elm Orly shaft is down 700 feet, and are getting fine copper ore, rich in silver on the Butte & Balaklava. They have struck a big, high-grade copper vein. Stock 10.00 now. Only commenced last July to work; formed a company and paid 400,000 for two fractional claims; look on the Butte map. I send mining paper in separate cover.

It was a Mr. Alexander Ray that was out here last

summer, connected with the Globe-Democrat; stockholder. Am satisfied that he would take stock for interest. Not over 800,000 for it and under bond at 18 months.

It is getting late so will close to get this off on midnight.

With best love and wishes.

I am truly yours,

ROD D. LEGGAT."

[132—74] Plaintiff's Exhibit 5—Letter, Rod D. Leggat to Chas. D. McLure, September 22, 1909.]

"Butte, Montana, Sept. 22d, 1909.

Mr. Chas. D. McLure,

St. Louis, Mo.

My dear Charlie:

Yours of the 3d with check payable to the Montana Secretary of Pioneers received some time ago. I met J. U. Sanders, secretary of the Pioneers, and he told me the enclosed bill for dues was correct and that J. T. Connors had not paid the same. I therefore turned your check for 8 dollars over to him and had him receipt the within bill.

I *had* to go to Helena on the 27 to attend the annual reunion of the 'Pioneers.' My heart would be pleased if I could have the pleasure of meeting you there. While there I will look over the secretary books and see if this bill is correct.

I met Mr. James Breen on the street to-day and he asked me if I had placed the proposition he had made to me for the purchase of your property in the Porphyry Duke before you (which was one year's

time at 100,000.00). I frankly told him I had not, for it was useless to make such a proposition to you. But I thought you would be willing to make a deal for a fair consideration and give proper time. I told him to go to St. Louis and see you in person or write his proposition direct to you. This he declined to do, but did, I think unknowingly to him, pay you a very high compliment by saying you were a 'hard-headed Scotchman,' which I absolutely denied, for you were a Missourian, true and blue and would 'have to be shown.'

Anyway he said he now had control of the 'Paupers' Dream' property and was trying to make a deal, and if you would place [133—75] deed in escrow in 1st Nat. Bank here at a fair consideration for six months he thought he could work it out. Will say that he to-day was strictly on business and I don't think he and Heinly are very friendly.

Now I don't want you to think I am interfering in your affairs, but I do wish you would sometimes take advantage of making a deal by letting me know what you would be willing to do.

I expect to leave for Idaho the last of next week and possibly will be gone until the 20th of Oct.

With best regards to self and family,

I am truly

ROD D. LEGGAT."



[Plaintiff's Exhibit 6—Letter, Rod D. Leggat to  
"Old Solomon," October 28, 1907.]

"Butte, Montana, Oct. 28, 1907.

My dear Old Solomon:

Your letter of the 22 does me lots of good to receive, for just as I am (also others) in the depths of despair your welcome letter comes and is opened by me overlooked by the statute of 'Daly' in front of the Federal Bldg., or Post Office. I assure you that it braced me up, for if there is any man on earth that holds the flag firm and never lowers it, it is you. I am with you, for you are no 'quitter.'

As to the Savings Bank, it is all right. The Mercantile of New York did not get at them. This I know for a certainty. I enclose clipping but really the doubt against the bank was made by the Amalgamated strikers and Davis Daly Co., for at times I *can* 'canny.'

[134—76] So God bless you and yours,

Ever Truly,

ROD D. LEGGAT."

[Plaintiff's Exhibit 7—Letter, Rod D. Leggat to  
C. D. McLure, 1/2, 1907.]

"Butte, Montana, 1/2, 1907.

Mr. C. D. McLure,

St. Louis, Mo.

My dear Charlie:

Yours of the 30th with copy of Crowley letter and your reply just to hand. Will say that where I have no direct interest in the Bland, you done what was

right for all of your *dirrerent* interests to refer the matter to me. Thanks.

Crowley has not got the bond for Forbis and does not own in the Bland. A Mr. Le Karon got a bond for  $\frac{1}{2}$  interest in Bland from Charles Mattison, which I wrote to you about, at 50,000.00 for fear that they would get Argyle interest tied up at that figure. I wrote to him, Tom, at Oak Park, California, that you held the claim at 150,000.00 and that you wanted the Argyle interest to get what you got and told him not to do anything, or tie his interest up without consulting me or you.

I also wired to Dennis Driscoll (who owns the Ready Cash claim) at Los Angeles, Cal. what he held Ready Cash at. His answer was 100,000, and he will do nothing now without first consulting me. As to who this Crowley is, I don't know, but as I have been almost bothered to death by this would-be promoter I cut them short, for as you Missourians say *that* 'have to show me.' I looked for a telegram from Mr. Rakously, consulting engineer of the Butte & Superior M. Co. from Duluth on or soon after his arrival there. Should get it by the 4th.

[135—77] I quietly saw to it that Mr. Wilmot should hear that Mr. Rakously had been in consulting with me. Result was that last evening he called me up by phone wanting me to meet him at the office. Mrs. Leggat went to the phone and told him that I would be at home all evening, so in 20 minutes he called. He himself wants to get this property or group, and has put it up to his Co., and told me that

Mr. Channing, the head one of his Co. would be here on Monday the 4th, and asked me to hold any deal in abeyance until he could take Channing over the properties, so you can see that I have been busy without trying to force them into a deal.

Wilmot wants to take hold of the Elvina on his own hook and I think we can consummate a deal when you come out, for I told him you possibly might be out on the 15th.

Just consider my suggestion as to you having power of attorney from Mrs. McLure as well as others, for if any deals are made it would save lots of delay.

Mrs. Leggat has not been at all well. Still up and around. I quietly one day told her that you were a little too stiff on terms and it was hard to get at the right parties. She absolutely told me that if I had half the sense and could hold fast as Mr. McLure did to property it would be better for all, so you see she stands with you firm.

We both join in best regards to you and yours.

Which one of the boys was hurt? I hope not seriously.

Very truly,

ROD D. LEGGAT.

If any important matter comes up will wire you."

**[Plaintiff's Exhibit 8—Letter, Rod D. Leggat to  
C. D. McLure, 1/28, 1907.]**

[136—78] “Butte, Montana, 1/28/1907.

Mr. C. D. McLure,  
St. Louis, Mo.

My dear Charlie:

I have not written you of late, for I really had nothing new to inform you of.

Saturday at Administrator sale of the James Forbes estate one-twelfth interest in the Narrow Gauge claim was sold at 30,000.00. I hear that the heirs had given an option on it over a year ago, but it had taken until now to consummate the deal.

I do think it would be a very wise move to get the estate interest in the Eastern, Ouichita and Bland settled up and that at once, for it will surely make delay on a deal if it is not done very soon.

A Mr. Victor N. Rakowsky of Duluth, the chief mining engineer for the Butte & Superior Co., has been here for a week and leaves to-night for Michigan. I gave him terms as you stated for the Eastern, Ouichita and Bland or interest thereon. Eastern 200,000.00, 20% when deeds were placed in escrow. Bland for your interest at the rate of 150,000 for whole claim. Ouichita at same rate per acre, it being a fractional claim. I think the terms above are just as we agreed on. I told Mr. Rakowsky that he could get the ‘Ready Cash’ claim at the same rate per acre, but the owner (Dennis Driscoll) was in California. Verbally he told me what he would do. I am afraid that you have a bad lot interested with



you in Bland, for I told Charlie Warren that you held the Bland at 150,000 for claim, and to-day Mat-tison, who holds in his name 6/12 or one-half of Bland told me he had bonded the same at 50,000.00 for one year. Knocking down. Siles King will stand with your figures on the [137—79] Ouichita. He is straight.

Mr. Rakowsky merely wanted time enough to return to Duluth to consult with parties there and he would wire result at once. I rather think that it is not for the Butte & Superior My. Co. but for a New Syndicate of Michigan and Wisconsin men.

Mr. Wilmot of the Lewisohn Development Co. returned from New York, but as he had not seen me further concerning the Eastern and Elvina, which he was to place before his company, I take it for granted that any deal for them by Co. is dropped for the present.

There has been several local parties wanting to tie up Eastern, Bland and Ouichita, but I gave them your direct ultimate terms and figures and that just staggers them. Will just say that I don't think that any outfit will pay 20% on deeds being put in escrow. On sixty or ninety days after escrow possibly it might be done.

When do you expect to come out here, or can you come? If there is a chance to make a deal for them I would wire you. I think it would be a good idea for you to get power of attorney from your wife and others, so in case you are called here there would be no delay as to making deeds.

When will P. A. F. be out here? It seems time for his appearance.

With best regards and wishes, I am truly yours,  
ROD D. LEGGAT."

**[Plaintiff's Exhibit 9—Letter, Rod D. Leggat to  
C. D. McLure, February 10, 1907.]**

**[138—80]** "Butte, Montana, Feb. 10th, 1907.

Mr. C. D. McLure,

St. Louis, Mo.

My dear Old Boy:

Yours of the 6th to hand and a good rounding up you gave me as to my hoary locks, but I forgive you this time, for your extreme flattery as to the good qualities of my better half fixes you solid in her good graces.

Wilmot called me up by phone on Wednesday evening and told me Mr. J. Park Channing, consulting engineer and head man of the Lewisohns, was here and wanted to know if the Eastern proposition was still open. I told him it was to him. He said they would be taking the mines in for several days and he would get Channing over the Eastern, Bland and Ready Cash just as soon as he could. So I have been very anxiously awaiting to hear or see him. Am well satisfied that Wilmot wants them to get hold of that group, and think they are taking it in very thoroughly, for neither of them have been to the 'Silver Bow Club' or have they been wasting any time doing things socially. I hear of a slight rumor that there might be a consolidation of their Granite Mt. and the Tuolumne Co., for the Tuolumne

Co. are sinking a three compartment shaft on their claim, which is near the Granite Mt. It looks to me as if there might be something in it, for their shafts are near together. So this might be the cause of them not seeing me up to this time. I don't want to go to them, only would like to meet by chance.

John Corrette, son-in-law of Dennis Driscoll and partner of Forbis & Evans, attorneys, called this afternoon to see me as to the 'Ready Cash.' Burt Adams Tower had been writing to [139—81] Driscoll to get the Ready Cash, but Driscoll told Corrette to see me, as I had wired him and he wanted to act with me. So you see how they are tying things up or trying to. Tower is the one you figured with on Bland last spring. And if a lot of different fellows get options on small interests the thing will be spoiled for any one.

As for giving Tom any information, other than to hold him solid to get at the sale of 150,000.00 for the Bland, did not even mention the Eastern, let alone the Elvina. Three or four people have asked me where his address was, but I couldn't tell them. So I am satisfied that at least some of them have written him.

I wrote him again to-day to hold, as I had formerly written him and it might not have reached him.

I got information from Mr. Rakowositz from Duluth that he could not make a deal there for his parties were absent from city.

I think you are wrong as to the Butte & Superior Co. wanting the Eastern. They have got, I think,

all they want at present and have paid out a great amount of money, so they can wait. Will post you just as soon as I know anything. When do you think you will be out here, for I might have to make a trip to Portland, Ore., on my Alaska deal or deeds in escrow. Not certain, but want to be here when you come.

Enclose clipping. Don't you worry about Teddy. If they all were as straight and honest as he one might be a little more proud of being an American citizen.

With best wishes from the 'Better half' as well as myself,

I am truly,

ROD D. LEGGAT.

[140—82] As I did not mail this last night, have just got new information so give it as I got it. Mr. Corette just told me that Bruce Kremer, the representative of the Butte & Superior Co. here, was to meet him this afternoon on a deal for 'Ready Cash,' but as Driscoll had written him to consult with me (Rod) as to the Ready Cash he wanted to let my know and will inform me of any proposition made before consummating the same. Driscoll, Corrette tells me, is willing to take part stock in any good company. Corrette has power of attorney for Driscoll.

I am afraid of different parties trying up interests so that a bungle will be made, and then I am apt to be left with something that I would rather unload.

Tell P. A. F. that the 'Coeur de Elaine' Metal &



S. Co. stocks are held to-day at 1.25. Stewart strong.

Will write again to-morrow if I get anything important.

Yours,      ROD."

**[Plaintiff's Exhibit 10—Letter, Rod D. Leggat to Charles D. McLure, May 25, 1907.]**

"Butte, Montana, May 25th, 1907.

Mr. Charles D. McLure,  
St. Louis, Mo.

My dear Charlie:

Yours of the 22d just to hand, contents noted, so will reply at once.

You will please find herewith proxy signed by me. Also witness signatures to same.

As to acting on the Board, you know best, but anything that will be of service or beneficial to your interest, I am at your service. Command me.

One thing I want distinctly understood. If there is [141—83] any stock or interest transferred to my name I will on demand from you transfer it at once back to you, so just keep this.

Yours very truly,

ROD D. LEGGAT.

My diggings in Idaho are running nicely, and I am in tip top condition personally. Would like to see you greatly. When will you be out here?

ROD."

[Plaintiff's Exhibit 11—Letter, R. D. Leggat, to  
Charles D. McLure, March 25, 1893.]

“Butte, Mar. 25, 1893.

Mr. Charles D. McLure,  
St. Louis, Mo.

My dear Sir:

I have just heard that there is parties that are trying to get the control of the ‘Southern Cross’ stock for some object. I have reason to think it is for John Hayes, but there must be some other parties behind him, for he has not the nerve to go into it himself. Do you think that any St. Louis parties are behind him. I could have got 40,000 to 50,000 shares in lots of from 1000 to 5000 for from 7 to 9 cents a share, but I only offered 5 cts. and that only to parties that were hard up and wanted to sell. So I gave them to understand that I was only accommodating them by offering that. Of course I do not know for sure that the above party is after it, but as it is a good proposition and there is money in it I take it for granted that it is so. The railroad going through that section sure will show the moneyed men a great opportunity to invest at a large profit. I will let you know just as soon as I can if there is any real deal for the property. I have been looking for a letter from you for some time and thought I would have your draft to pay off with long ere this. Hoping to hear from [142—84] you soon,

I am truly yours,

R. D. LEGGAT.

‘Daly’ has got hold of the ‘Alps’ property on Harvey Creek. It is gold properties.”

**[Plaintiff’s Exhibit 12—Letter, Rod D. Leggat, to Charles D. McLure, April 8, 1893.]**

“Butte, Apr. 8th, 1893.”

Mr. Chas. D. McLure,  
St. Louis, Mo.

My dear Sir:

You will please find herewith a sort of a report or hurried data of a gold property situated in Jefferson County, this state. It is made by L. B. Olds, who has examined the property and has it tied up by bond.. I have heard of this property for some time and know that they have been working it by slicing the decomposed ore off every season. Mr. T. T. Baker of Baker & Harper gave me just about the same data concerning the property as the enclosed reports do, and he told me several months ago concerning it.

The title to water district, quartz claims and placers are perfect, or so reported, so I thought I would send you Mr. Old’s proposition and if you think anything of it you could send your experts to examine. This will have to be done quickly if you consider it, for I have only got a short call on it. Please let me know your decision.

I have not heard from you in a long while. Have been very anxiously looking for draft from you, so I could settle the Elvina accounts all up. Please send it to me for it places me in a very bad position with those we owe.

[143—85] Hoping to hear from you at your very earliest convenience,

I am truly yours,

R. D. LEGGAT.”

**[Plaintiff's Exhibit 13—Letter, R. D. Leggat to C. D. McLure, March 8, 1893.]**

“Mar. 8th, 1893.

Mr. C. D. McLure,

St. Louis, Mo.

My dear Sir:

You will please find herewith statement of the last ore run by Mr. Adams with check for the amount of 305.55 received. I sent you by mail two different St. Louis drafts payable to you or order. 1st one for 1272.63 (less exchange) and another for 1273.88 (less exchange). As I have not received any acknowledgment of their receipt by you I am afraid that they might have miscarried. If you have not received them let me know. I have all small tools and filings of all kind securely packed in boxes and numbered and all the machinery tallowed and white leaded and in good shape. I would have stored at A. J. Davidson, but they could not give the storage room. Am looking for some permanent and responsible storage warehouse (that does not change hands monthly). Will then store and send warehouse receipts to you as you instructed. I only got back from my mission at Helena on Friday last, since which time I have been sick and confined to my house. Am all right now and solid as ‘Granite County.’ Col. Hart is a whale and the opposition



that he overcame, conquered and won from was the strongest in the state. I say all honor to him.

I hope you will send me draft so that I can clean all accounts up at once, as I want to send you all vouchers and cannot do so until I have the where-withall to do so.

[144—86] Hoping to hear from you at your earliest,

I am truly yours,

R. D. LEGGAT.”

[Plaintiff's Exhibit 14—Letter, R. D. Leggat to Chas. D. McLure, February 13, 1892.]

“Feb. 13th, 1892.

Mr. Chas. D. McLure,

St. Louis, Mo.

My dear Sir:

Yours of the 7th to hand; also both telegrams of same date. You state that you wired me on the 1st. That telegram did not receive. I have closed the mine and have put all of the underground workings in good shape so no damage can be done by water. I will store the loose material with A. J. Davidson as you instructed.

You will please find herewith St. Louis draft payable to you for 1273.88 (less exchange of 155). Also statement of ore worked. What I presume Mr. Adams has reported as I told him so to do. I just got telegram from Helena to get these this evening to be on hand for the Committee meeting of Towns and Counties, so am in hurry to catch train. I have got Walter Cooper, Senator Hoffman and the entire Bergman delegates to assist us on the ‘Granite County.’ I *hapned* to be in a good position with

them, as I had been strong with them on the 'Capital' question last fall and stood shoulder to shoulder with them in the location of the college at Bozeman. I will merely say that we will have a hard fight. 1st it has come so late in the session. 2d. the members think there are *two* many counties being made. 3d. the Deer Lodge are shrewd politicians, are well acquainted with members and have a large, strong lobby that are [145—87] at work and know their business and do it well. The Senatorial matter this week will have a great influence on it. My letter in December to you as to that result will come true. Neither Clark or Dixon can be elected. It will be a new man as I then stated. I am keeping my hands off of the Senators.

Yours very hastily,

R. D. LEGGAT."

[Plaintiff's Exhibit 15—Letter, Rod D. Leggat to  
"Charlie," October 6, 1906.]

"Butte, Montana, Oct. 6, 1906.

My dear Charlie:

Got your telegram telling me to get abstracts from Mr. Poser and send to you. As he was out in the fields I only got them a short time ago and too late to get them in the express office, and as I don't like to trust the mail, will hold them until to-morrow and send them to you by express.

I gave the order for straight abstract of the notes you gave me to the abstractor of Deer Lodge & Powell County and he will rush it, but tells me it will take two days to do it right, as you wanted everything either by location, transfers or trades of Chas. D.

C. D. Louis or his widow, John T. or J. T. Connors. When you get it it will be right. Don't blame me for delay, for I only could get the proper person that had the abstracts of Powell and Deer Lodge County in their possession, and then at Anaconda.

Mr. Power told me he had written to his people (not wired) but that he thought they would want more time to inspect the properties. I merely told him (as you had done) that 20% per cent would have to be paid when the properties were placed in escrow and that we would not tie properties up unless it was done not for [146—88] a day. He spoke of them having to send other experts to inspect and examine, but I was firm as to what you want.

Rather looked for you to-night, but go to church to-morrow and don't disappoint me again.

Where shall I send the abstract ordered. Is P. A. F. there, and when will he be here? I have to make a trip to Idaho and don't want to leave until I see you.

Hastily,

ROD D. LEGGAT."

**[Plaintiff's Exhibit 16—Letter, R. D. Leggat to  
"Charlie," December 2, 1906.]**

"Butte, Montana, Dec. 2d, 1906.

My dear Charlie:

Your two letters came to hand as well as J. C. Adams copy of report on the Elvina claim. I have not see Mr. Wilmot since I wrote you. Thought it best to wait until he heard from New York, as he was to report on property and the price and terms that we agreed to make on the Eastern as well as

your terms on the Bland and Ouichita, which I gave him in strong terms and nothing like weakness at that, either in manner or voice.

Still at utmost thoughts the 20% payment looks mighty big to be a successful deal to me, or if it is it will take time to accomplish it.

There has been two different parties after the Eastern and Ready Cash. One yesterday by the Supt. of the Moulten Mining Co., G. W. Brown, who has been with Clark for 10 years, and I gave him figures and term price 200,000, 20% down on signing papers. I do not think he is getting price or terms for Clark, [147—89] but I saw him the other day with an Englishman that is here from South Africa and is going to London on the tenth. In fact I gave terms on my Bummer and Occidental claims the other day to Dr. Freund, who lives next door to me, who is acting for the Cockney.

As you instilled some of your holdfast nerve in me I put the price high, 150,000, and did not bat an eye at that. To-day at 4 o'clock was called up by phone by party that formerly was Dun & Co., confidential agent here in Montana. Met him shortly after and he wanted figures on Eastern. Being Sunday I merely told him that a deal could be made for the properties, gave no price, but said 20% of price must be paid down before deed went in escrow and parties must be responsible financially. Some more of C. D. Mc wisdom and nerve. Will meet this party to-morrow and may glean something further. J. N. B. Foster (deceased)  $\frac{1}{8}$  interest in the Deadwood claim adjoining the Eastern is to be sold on



the 21 of this month. I think it had been bid in at 1000.00. Will go to Probate tomorrow and get it right.

What best to do about it, write me.

The Butte Hill Copper Co. is the shaft that we see from the Elvina last spring and we drove there. Their ground extends east to the Colleen Bawn and north. Some English Jews are interested in it. They have not struck anything as yet and are not working, but expect to start in soon.

Can't you send copy of Col. Hart's report, might want it.

With best regards to you and yours,

I am as ever truly,

ROD D. LEGGAT."

[**Plaintiff's Exhibit 17—Letter, Rod D. Leggat, to  
Jesse B. Mellor, August 20, 1909.**]

[148—90] "Butte, Montana, Aug. 20, 1909.

Mr. Jesse B. Mellor,

St. Louis, Mo.

Friend J. B.

Yours with slip from the G. D. was gladly received for it eased me very much as to my sister's condition and many thanks for the same.

Just got yours of the 17th as to the taxes. I have always paid the taxes myself on the Elvina and Eastern claims. The taxes on the Bland has been paid yearly by the John N. Curio Est., who own a small interest, so that is all right, for I just come from there, as I wanted to be sure before writing you.

The taxes on the Ouichita Mr. Silas King told me before he died that he always paid them. The executor of the estate is now absent, but I will see him on his return and if he has not attended to it I will.

Am extremely pleased to hear that Mrs. McL's condition is improving, for it will be a great relief to our dear friend and help to make him as of yore.

I do hope that something can be done to get his mind on something so that he will not brood so much on imaginary troubles.

With best regards and esteem to self and family, as well as the Gov.

I am truly,

ROD D. LEGGAT.

Will write him to-night.

**[Plaintiff's Exhibit 18—Letter, Rod D. Leggat to Chas. D. McLure, October 19, 1910.]**

**[149—91]** "Butte, Mont. Oct. 19, 1910.

Chas. D. McLure,

821 Security Bldg.,

St. Louis, Mo.

Address of General Manager R. M. Atwater is Duluth, Minn. ofs. A. B. Wolvin brought Elvina matter up with his brother in charge here. He will report it to headquarters. Doctor Reives as yet has heard nothing from his parties.

ROD D. LEGGAT."

**[Plaintiff's Exhibit 19—Letter, "Rod" to "Charlie," February 5, 1908.]**

"Butte, Montana, Feb. 5, 1908.

My dear Charlie:

I have been engaged since Monday on the suit I

(Testimony of Charles D. McLure.)

commenced as power of attorney for the J. N. B. Foster interest, to set aside the deed for one-sixth of the Deadwood claim. I enclose the clippings, and as it will not be concluded for a day or two yet will keep you posted.

John N. Simpson spoken of was the man that made all the deals for the Butte & Superior Co. claims.

In my testimony I put the value at June, 1906, at 80,000.00. Others were all higher. Looks as if I have been of some use for charity's sake, for the rascals are on the 'Ragged edge.'

Am looking for instructions from you. Did you get blueprint and report of Alexander?

Hoping to hear from you soon

I am hastily,

ROD."

[150—92] The WITNESS.—That is not all of the correspondence I had with Mr. Leggat, these letters introduced; that is only a small portion of them. I have examined all of these papers that I have brought here with me. The papers are letters and correspondence I have had with Mr. Leggat during the time of our poast association. All of them, unless there would be one or two of Mr. Alexander Leggat's. It is all Mr. Rod D. Leggat's correspondence with me, with maybe one or two exceptions.

Direct Examination of Charles D. McLure continued by Mr. MAURY.

Q. Now, Mr. McLure, coming down to the immediate transaction in this suit, taking the properties

(Testimony of Charles D. McLure.)

that are involved in this suit, what has been the value of these properties since, we will say, June 1st, 1913, or the 1st of Jan. 1913? What are the values of these properties described in the complaint?

A. Well, there have been several parties who came to me for prices on the property, several of them, Mr. Channing, came after me to get me to set a price on the Eastern, and he tried through some one, I am not sure, but someone introduced me to him and asked me for a price on my interest, and he offered me one hundred thousand dollars and I declined it, and said he would have to see Mr. Leggat, that I would not make a price on the property, that Mr. Leggat had charge of it and that the property was held at two hundred thousand dollars and that he would have to see Mr. Leggat. There had been several offers at different times to get the property, and especially the Eastern, at a price below two hundred thousand dollars; and on the Bland there was at one time, Mr. Charles S. Warren took the proposition and offered eighty thousand dollars cash, and he said Mr. Leggat wrote to him about it, and I declined it and said that Mr. Leggat had charge of it and that he would have to see Mr. Leggat, and finally I think Mr. Warren telegraphed him. [151—93] I mean Charles S. Warren, Genl. Warren. He telegraphed him and I told him there that I would not sell for less than the price designated. I have bought and sold a great many mining properties, both quartz and placer, for the last thirty



(Testimony of Charles D. McLure.)

years; yes, it dated back to that—in 1860. With my experience in mining matters, I have familiarized myself with the values of mining properties, and what they were bought and sold for.

Q. When the properties involved in the complaint, the interest in the Elvina, the interest in the Ouchita, the interest in the Eastern, and the interest in the Bland quartz lode mining claims were advertised for sale, what did you do on the morning of the sale?

A. On the morning of the sale, I think the sale was had about nine o'clock; I got up early in the morning and got my breakfast and went up to the sheriff's office, and I got there before eight o'clock, or I believe a half hour or a quarter of an hour before eight o'clock, and the deputy, or clerk, was there and I asked them if I could come up and pay off the judgment and stop the sale—in other words I wanted to save any expense of a sheriff's sale, and he replied to me that the property had been advertised for sale and would have to be sold, and I asked him then what time it would be sold, and he said at ten o'clock; I then asked him if he would take my check if I would bid on the property, and he said it would have to be a certified check. Well, I says, you can telephone to the bank and see whether the check is good, and he replied then, he said, "Mr. Wight will be here at the sale, and if he will take your check it will be all right," and my reply was that Mr. Wight had sued me and I would not ask him to take my check, so I came up and went to the hotel, which was at least a few minutes before nine o'clock, and I telephoned to

(Testimony of Charles D. McLure.)

Mr. Leggat and told him what had passed, and as Mr. Leggat was an [152—94] owner in the Eastern claim, which was in my name, or rather I held it, and I told him they had refused my check and I says “come over” and he said “All right, I will be right over” and he came over. And I was sitting in the hotel waiting for him to come and I saw him coming across the street, and before he had crossed the street I went over and stopped him, and I says, “Mr. Leggat, the sale is to be at ten o’clock” and I says, “They refused my check” and he says, “They will take my check” and I says, “will you come up and bid it in,” and he says, “Yes,” and I says, “I will give you a check when you come down” and he says, “all right, I will go up and attend to it” and he went up to the sale, and I suppose it was about a quarter after ten or half-past ten, anyway between ten and eleven o’clock and he came down to the hotel and he told me that he had bid the property in, and he said that Mr. Murray was there, I think he said James A. Murray, but I am not sure, but I know he said Mr. Murray was there, and he said some of the Hennessys, and they were going to bid the property in, and he went in and told them that it was our joint property, and said that by his own influence he had persuaded them not to bid against him, so he told them their account would be all right and that he would bid it in, and he did bid it in, and I says, “Rod, if you want a check for this I will give you my check for it” and he says, “Never mind that—

Mr. SCALLON.—We object to any conversation

(Testimony of Charles D. McLure.)

of this kind, any oral evidence of any private agreement, or any conversations subsequent to the sale, as incompetent and not the best evidence.

The COURT.—The objection is overruled for the present; if it is not entitled to any weight, the Court in making up its final decision will give it none.

Q. What did Mr. Leggat say about his having procured these other gentlemen not to bid?

[153—95] A. He said to them that he was interested in it and through that fact they had declined to bid on it, on the theory that he would, himself, see that their debts were paid as well as his own, and that they would be perfectly secured, as the matter was in his hands.

My impression is that the amount that he had paid was only nine hundred dollars, I am not sure about that, whether that was the amount, but nine hundred and some odd dollars.

Q. What transaction took place in August of the present year?

A. Why, I think Mr. Leggat was going to St. Louis, he was going there on some business connected with the enterprise, which is now the hotel, or in some way we were talking—It was nothing which concerned me whatever, and he says, “Can you give me five hundred dollars?” and I says, “Certainly I can” and I took out my check and I gave him five hundred dollars. I had that check on yesterday down at Gunn, Rasch & Hall’s office. It had been returned to me in the ordinary course of business. Mr. Leggat’s signature was on the back of it

(Testimony of Charles D. McLure.)

when it was returned. That money had not been repaid to me up to the date of the sale; I had not even thought of it until I got to thinking about matters connected with this case. I never thought about it until after I came west here this spring. I found the check; I got to hunting up these papers and I found this check; I had forgotten all about it. There was to be no repayment with interest, not then nor now.

Q. Mr. McLure, did you have any further conversation with Mr. Leggat about this property after that sale?

Mr. SCALLON.—To which we make the same objection.

The COURT.—The objection is overruled.

To which ruling of the Court counsel for defendant duly excepted.

[154—96] Q. Mr. McLure, did you finish telling us the conversation you had immediately after the sale with Mr. Leggat?

A. I think I have, there was nothing transpired—we may have talked about the chances—

Q. You told us that you told Mr. Leggat you would give him your check? A. Yes, sir.

Q. What was said about that?

A. Well, his reply to that was, it didn't make any difference, he said, "it does not make any difference, I will take care of it, or I will look after it," and of course we were interested together and Mr. Leggat had on many occasions felt that he ought to have—well one special occasion I recall to mind having



(Testimony of Charles D. McLure.)

signed his paper, we would sign them together, and he says, "Say, suppose something would have happened to you I would have been in a nice scrape with that paper out against you" and we talked the matter over and we mutually agreed that he would deed the property back to me if it became necessary, and—

Mr. SCALLON.—I object to this as being an opinion of the witness; let him state what took place, and I move to strike out the latter part of that answer.

Motion sustained.

Q. What did he say about that in substance, we do not ask you for the exact words, unless you happen to remember them, in relation to reconveying the property, or deeding it back to you. What did you say, and what did he say, if you recall at that time, immediately after the sale?

A. I think I asked him, I says, "Rod, if the sale goes through will you make me a deed" and he said, "Yes," and then I askel him "in case the sale does not go through will you make a deed back to me, keeping your half interest in the Elvina" [155—97] and he said, "Certainly I will."

That half interest in the Elvina was procured in this way, I worked for the first quarter interest—

Q. I am talking now about the time of this sale—you explained that when Judge Rasch was conducting his examination about who owned the Elvina, but, how did the interest stand in July, 1912?

A. It was all in my name. He was the real owner

(Testimony of Charles D. McLure.)

of one half, Mr. Leggat, and I the other half.

On July 17, 1912, Mr. Leggat and I signed a paper together. The lease and option to which you call my attention is the paper. It is the one that was delivered to Anderson and Slattendale. It was a lease on the Elvina.

Mr. MAURY.—We ask that this lease be marked Plaintiff's Exhibit 20 and we will offer it in evidence.

Lease received in evidence without objection and is as follows:

**[Plaintiff's Exhibit 20—Lease, July 17, 1912,  
between Rod D. Leggat and Charles D. McLure,  
et al.]**

#### LEASE AND OPTION.

This indenture, made and entered into at Butte, Montana, this 17th day of July, in the year 1912, by and between Rod D. Leggat of Butte and Charles D. McLure of Phillipsburg, Montana, lessors, and Ernest David Anderson and P. Andrew Slattendale, lessees, witnesseth:

That for and in consideration of the rents and royalties to be paid by the lessees, and the covenants to be performed by the lessees, all as hereinbefore set forth, the lessors have leased, demised and to mine let unto the lessees for the period of two years commencing on the 31st day of August, 1912, and ending on the 31st day of August, 1914, (unless sooner terminated by forfeiture of some condition hereinafter set forth) all of the following described

property situated in Silver Bow County, [156—98] Montana, to wit:

The Elvina quartz lode mining claim, being Survey No. 1054, lot No. 251, and being patented, and in Summit Valley Mining District in the said county and state.

Upon, however, the express terms and conditions binding on the lessees:

The lessees shall pay to the lessors twenty per cent of the net smelter returns of all ores shipped from the said claim or any part thereof.

The lessees may within thirty days after the expiration of this lease, either by lapse of time or by forfeiture, remove from the said claim all machinery and surface improvements owned by them, unless the lessors do exercise their option of buying the said machinery and surface improvements, which is hereby given, the price to be fixed, if the lessees and the lessors cannot agree upon the reasonable value, by some disinterested arbiter to be agreed on by the parties hereto.

Two days before each and every shipment of ore from the said mine the lessees shall cause to be mailed a notice to each of the lessors directed to each at Butte, Montana, stating to what mill or smelter or reduction works the said shipment is about to be made.

The lessors shall at all times have the right to use and enjoy, taking care of and handling at their own expense, however, after the same shall have been raised to the surface of said mine, any and all water pumped from the said mine by the lessees or their

executors, administrators or assigns, save and except enough for the use of said lessees in their mining operations.

[157—99] And commencing on the said 31st day of August, 1912, the lessees shall, during each calendar month, do at least twenty shifts of eight hours each and of two men at work upon or underneath the surface of the said claim. That is to say, there shall be forty shifts of eight hours each done by the lessees upon the said claim in each and every calendar month during the said lease;

Commencing at sometime within the first twelve months of the said lease—that is to say, at sometime prior to the 31st day of August, 1913, the lessees shall commence and drive, with reasonable diligence, at the level 250 feet below the surface of the said claim, a crosscut to and into the north vein in the said claim. The lessors reserve the right to at any time inspect either in person or by agent, any of the workings made by the lessees on or under the said ground; and the lessees agree to furnish to the lessors or their agents, at all times, ingress into and egress from the said workings and all of them, and to give the use of any hoisting apparatus for such ingress and egress to the lessors or their agents;

The lessees shall do all work on the said ground and underneath the surface thereof in a good and workmanlike and minerlike manner and fashion for the best advantage of the property as a workable mine;

If at any time during this lease the lessees shall be in position, by reason of their operations, to ship as



much as fifteen hundred tons per month of ore, then the lessors shall have the privilege, if they so desire, to place some competent miner on the ground as an inspector of shipments for the lessors, and such inspector shall have the right to take samples and in otherwise care for the interests of the lessors, and the reasonable wages of such men shall be borne and paid one [158—100] half by the lessors; one half by the lessees;

A failure to keep strictly any of the provisions of this lease on the part of the lessees shall work a forfeiture of all rights of the lessees in the lease, as also shall it work a forfeiture of all rights in the option to purchase, hereinafter set out.

Time is strictly of the essence of this contract of lease in all its conditions, as well as of the essence of the contract of option hereinafter set out; and in the event of any such failure the lessees agree to surrender the premises and give peaceable possession to the lessors or their agents of all of the property hereinbefore set out.

And for and in consideration of the sum of \$1.00 and other valuable considerations, to wit, the covenants hereinbefore set out, and the payments hereinafter to be made, the lessors do agree, for themselves, for their heirs, executors, administrators or assigns, to sell and convey, by good and sufficient bargain and sale deed, unto the said lessees or their heirs, executors, administrators, or assigns, the said Elvina quartz lode mining claim, unincumbered, for the full sum of 'One Hundred and Fifty Thousand Dollars (\$150,000.00)) to be paid by the lessees at the Miners

Savings Bank & Trust Company bank in Butte, Montana, at or before the following times and dates:

The first payment is of \$10,000.00 and must be paid at the said bank on or before the 31st day of August, 1913; the second payment is of \$10,000.00 and must be paid at the said bank on or before the 30th day of November, 1913; the third payment is of \$20,000.00 and must be paid at the said bank on or before the 28th day of February, 1914; the remaining balance of the purchase price, to wit \$110,000.00 must be paid at the said bank before the termination of this lease either be forfeiture, as hereinbefore set out, or failure to keep the [159—101] covenants or any of them binding on the lessees, or by the lapse of time set forth in the said lease, to wit, the 31st day of August, 1914.

It is, however, agreed that the royalties and all of the same shall be applied to the reduction or payment of any of the payments hereinbefore set out, except the first payment. None of the royalties shall in any wise be deemed to apply on the said first payment, due on or before August 13, 1913, at all.

All of the covenants and agreements set forth herein inure to the benefit of and are binding upon the heirs, personal representatives and assigns of all parties hereto.

And in all features of this contract, both lease and option, and in all payments to be made, and as to each and every installment, time is of the essence, and if any installment or installments be not paid within the time or times hereby limited therefor, all previous installments shall be and remain the prop-

(Testimony of Charles D. McLure.)

erty of the lessors and the mining claim shall remain their own, unaffected and unincumbered by this contract.

The lease and option are co-terminus.

WITNESS THE HANDS AND SEALS of the parties hereto this 17th day of July, 1912.

(Signed)      ROD D. LEGGAT,  
CHARLES D. McLURE,  
ERNEST D. ANDERSON,  
P. ANDREW SLATTENDALE.

[160—102] The WITNESS.—When Rod Leggat returned from the sale that morning I offered him my check. I said to him, “Rod, if you want a check for this I will give you my check for it” and he says, “Oh, it is not necessary at all until the sale is made, and if it is not made then I will deed back to you with the exception of that half interest in the Elvina.” I say Mr. Leggat often between the date of the sale and the same day of the following year, say him very frequently, almost every month, there in Butte, I don’t recall every month, but I say it ran through almost every month, it didn’t escape over one or two and sometimes I saw him twice a week and sometimes three times a week, depending entirely on the state of my business. If I was in Butte, the first thing I would do would be to call up Mr. Leggat, and invariably he would be down—that would be in the morning, I would not go down if it happened to be at night, but of course in the morning, and in the mornings we would generally spend them together— we were pretty good comrades.

(Testimony of Charles D. McLure.)

About our social relations, you might say we were friendly, more than socially, I don't think there was much sociability connected with it but was friendly. Sometimes we would go to the theatres together, and sometimes we would take the car and ride out to the lake, and sometimes we would ride out to the gardens, go out there and spend a little time more for the ride than anything else. Whenever I was in Butte, we two were pals, and almost continuous companions; unless we were down at the Finlen with three or four more, all of us would be together. During the year before the expiration of the time for redemption, almost every time we would meet we would be sure to speak about this property. I knew it was on his mind and it was in my mind, and I think both needed the money and both anxious to have a sale consummated and get the money. By reference to a sale consummated [161—103] and getting money, I am speaking about the Eastern, the Bland and the Ouichita, the same old transactions that Capt. Sanders was speaking of when he was on the stand to-day. I was in Butte between the 26th day of May and the 1st day of June of last year.

Q. Did you have any conversation with Mr. Leggat about this proposition then?     A. Yes.

Q. You may state to the Court what that conversation was, in substance.

Mr. SCALLON.—We object to this as incompetent, and as not being the best evidence, and also as immaterial.

The COURT.—The objection is overruled. If it



(Testimony of Charles D. McLure.)

is entitled to no weight it will be given none in making up my final decision.

To which ruling of the Court counsel for the defendant duly excepted.

A. I remember of coming to Butte, and I think I telephoned Rod that I was coming over, and we were together for several days, and finally one evening we were sitting together and we were talking about the matter of this deed, and I said to Rod then "Within a day or so you will give a deed, and I want an understanding about it. If the sale is made will you make that deed over from Wolvin and Hayes to me?" and he said "Yes" and I said "In case it does not go through will you make it to me, and he said, "Certainly"; that was a short time before the limitation ran out. By limitation I mean what you call the redemption. I told him then, "If you want a check for that, I have got one for you" but I had forgotten about the five hundred dollars until I was looking through my papers, but of course he would have gotten my check for whatever he had paid out, and I would consider that [162—104] now as far as that is concerned. I had enough money on hand at that time to have paid a thousand and four dollars and the interest at the rate of eight per cent from June 1st, 1914. I know my check would have been good for that amount. I can't say how often in the last fifteen or eighteen years Mr. Leggat visited St. Louis, Mo., but when he did come he would generally let me know that he was coming, and I think he did on every occasion until this last winter, last winter.

(Testimony of Charles D. McLure.)

He used to always have his mail sent to my office, when he was there on these visits, and he would come there when he would come to town; he would come to my office for the Butte papers, the Butte Miner and the Standard, he took both of them, and we invariably mailed them to him if he did not come after them; that was the order that was left with Mr. Jesse D. Mellor. I would not say how many times he was in St. Louis in the last fifteen years, but I know he was there several times; I don't know if it was five or three, but when he was there we almost invariably spent our evenings together, and would go to the theatre and other places; I know I remember once when we went out together to lunch, it happened to be on election day, and he thought it was quite a joke from the fact that he couldn't find any place to get a glass of beer.

Q. When he came this last winter did he get his mail at your office?

A. When I left there, I think it was in October, Mr. Leggat had been sick, and I came to Butte, I think it was on the 10th, I let Rod know I was coming and I says, "Rod, come on and go to St. Louis with me," I says, "Get into a lower altitude, go where your circulation will be better and spend the winter down there."

[163—105] He had been quite ill, I don't know what it was, I don't know whether it was apoplexy or not, but anyhow he had been quite ill, and he said, "I can't go now, because I have got some things to do at the house in fixing up the heirlooms" and he had to

(Testimony of Charles D. McLure.)

fix up the water, and I said, "Well, Rod, I will wait for you a couple of days if you will go," and I said, "You can travel with me," and he said, "Well, I will see," and I waited two days and he said he could not go, and I went to St. Louis and I think Mr. Leggat—about probably a week after I came there there was an envelope addressed to him came there, came to my office, and I said to Mr. Mellor, "Rod must have been in town, has he been to the office?" and he said, "No" and I said, "Call up and see if Mr. Leggat is in town."

Col. Butler is a brother-in-law of Mr. Leggat, so I went up and I called Mr. Butler, and I says, "I heard Rod is very sick" and I called him up and I found he was out, and the letter was mailed up to him, and these papers were then mailed to him several times. While he was there he came down to the office, came down and took lunch with us, came down with Mr. Butler in the automobile and then he would come over to my office.

Q. Now, Mr. McLure, in November of this last year, 1914, did you commence any negotiations to sell what you call the Butte property, which is here involved in this suit?

A. Why, I told Rod when I left here that I was going to try to raise some money, I said I needed it, I wanted to get straightened; I said "I can't wait any longer," I says, "You have got your money and I need some money." By that I meant his quarter interest. I know at that time that he had got his money for the Eastern, he got his money; in fact, my

(Testimony of Charles D. McLure.)

authority was [164—106] Mr. McQueeney. He said he had taken an option, and I says "I am going to sell, but I had to raise some money in St. Louis at that time." That is the reason I wanted him to go to St. Louis, in case I had to make out any papers he would be there, and he told me he had to stay on account of fixing up his house and fixing things up around there, and I didn't know whether he would really go back or not, but of course I was going to St. Louis; when I left here I went to Mr. Templeman and I told him I wanted to sell the property and see if he had a chance to sell it. That is John L. Templeman. I went to St. Louis and Mr. Leggat came there and we were together more or less and finally I wrote Mr. Templeman and asked him what was the result, and he told me that there were several parties on the string inquiring about it, but nothing definite, but he did not think there was much show, and I told Mr. Leggat about it and he says "Why, I guess if you will wait long enough, maybe the Butte & Superior will take it up yet," and I waited for some time and finally I wired Mr. Templeman and asked him if there was anything doing, and he wired back and asked me what was the lowest cash price I would take for the property, and I sent word out to Mr. Leggat and told him, and it was some little time before I got Mr. Leggat. I called up Col. Butler, and it resulted finally in making connection with Mr. Leggat, and he came down to the office and I says, "Rod, I have about concluded to offer the property for one hundred thousand dollars." That was the



(Testimony of Charles D. McLure.)

interest in the four of them and the bond due me would be one hundred and thirty-five thousand dollars; that is, if the sale was made to the Butte & Superior Co., and I wired Mr. Templeman and Mr. Templeman replied to that that there was nothing doing, or something to that effect. Mr. Leggat's reply to that was, he says, "Charlie, you are getting pretty low on it, you have come [165—107] down a good deal," and I says, "Rod, I will be pleased to get that," and I says, "If they accept it I will expect you to make a deed," and Rod says, "Certainly, I will make a deed." This was just after Christmas, along in the first part of the winter; it was just after Christmas that the first property went, and the hundred thousand dollars came along a little later. This was last Christmas that I speak of. The last time he asked for the price was some time in February.

Mr. MAURY.—We will now offer in evidence check given by Charles D. McLure on August 10th, 1912, to R. D. Leggat for five hundred dollars.

Check received in evidence without objection and marked Plaintiff's Exhibit 21, is as follows:

**[Plaintiff's Exhibit 21—Check, Charles D. McLure,  
August 10, 191—.]**

"Butte, Montana, Aug. 10, 191—. Mo. 13.

STATE SAVINGS BANK.

Pay to the order of R. D. Leggat \$500.00, Five Hundred and 00/100 Dollars.

CHARLES D. McLURE."

Endorsements:

"R. D. Leggat. Paid State Savings Bank, Aug.

(Testimony of Charles D. McLure.)

11, 1912. Butte, Mont.”

5 o'clock P. M. Case continued to June 22, 1915, at 10 o'clock A. M.

Tuesday, June 22, 1915, 10 o'clock A. M. case resumed.

CHARLES D. McLURE, direct examination continued.

(By Mr. MAURY.)

Q. How long did you say you had been a citizen of Missouri?

A. I went right to St. Louis—well, since 1881.

I was residing there when this suit was commenced. I [166—108] was there when this suit was commenced. The loan of five hundred dollars to Mr. Leggat of which I spoke yesterday was made by a check, that is the check there. That is the check which I delivered to Mr. R. D. Leggat. The signature on the back of the check is the signature of Mr. R. D. Leggat. It came back to me through the ordinary course of business from the bank. That is the check, marked Plaintiff's Exhibit 21, which has been introduced in evidence. I received another letter from Mr. Leggat on April 11, 1910, concerning the Eastern. That letter is in Mr. Leggat's handwriting.

Mr. MAURY.—We offer this letter in evidence and ask that it be marked Plaintiff's Exhibit 22.

**[Plaintiff's Exhibit 22—Letter, Rod D. Leggat to  
C. D. McLure, April 11, 1914.]**

Exhibit 22 received in evidence without objection and is as follows:

“Butte, Montana, April 11, 1914.

Mr. C. D. McLure,

St. Louis, Mo.

My dear Charlie:

Yours of the 8th just to hand so will drop you a line or so more.

When Mr. Lucas was here he asked me to get what information I could as to what the ‘Clarks’ or the Elm Orlu zinc ores were being handled at. Mr. Will A. Clark, Jr., was here the last of the week from California, and I asked him direct if he could or was willing to give me any information as to their handling of the zinc ores from the Elm Orloo. He stated that in their plant at Butte Smelter they were saving it to a very high per cent and successfully. Also said that any information as to the working of the Elm Orloo ores he would gladly furnish to you or the Granite B. Met. Co.

I heard of a plant at Dallas, Texas, firm name ‘Sutton Steel & Steel’ who worked 3 car of zinc ore last fall from the Butte [167—109] & Superior (or Blackrock) and the party that took it claimed they done it very successfully. Why not write them or investigate what they can do. It will do no harm to.

I don't think that the B. & S. zinc ores that are being worked at Heinze's concentrator at Basin are a

success, for a party tells me that often the ores are run through twice. Some friction among bosses.

B. & S. people made a 5% payment on the Daniel Quilp on the 1st of April, had option at 240,000.00. Also made some payment on the Damarak, adjoining property, option on both properties seems for two years. They have also option on 'Deadwood' at 150,000.00 and the 1st 5% payment is to be paid on 1st of May. All the deeds are in escrow at 1st Nat. Bank.

The Deadwood is the claim that I saved a one-sixth interest for the widow and heirs of J. D. R. Foster. Out over \$200, but I caught some rogues so I'll get Nit.

I have not been approached by any of the B. & S. people as to the Eastern. Can't tell why. Guess they think that Charles D. McLure ain't an easy mark.

I hear that Mr. A. B. Wolvin, the president of Butte & Superior is expected here along about the 15th. As I met him a year or two ago I will try and rub up against him again, and I assure you I will be prudent.

I will have to go to Idaho for I have been running a 500-ft. tunnel for a very promising surface prospect of gold quartz. Last advices said the formation in face of tunnel was very much mineralized and much more water. I deducted that they were near the ledge, as the 'crow would fly' only about three miles from the Big Strike on the south fork of the Clearwater, or ten mile district. I enclose clipping



just received. Please return it to me after reading.

[168—110] I can't just say when I will go, for I don't want to miss seeing you when you do come. I am not going to work the place ground this summer, but will have to protect it. It was so late when I got hold of 4/11 four-eleventh interest in the property that it was impossible to get materials in over the bad roads. So I will be kind of foot loose this season.

There is a man here by the name of Masters who, I believe, is a mill man, and has often asked for you. I hear that he is a steady, reliable, and as he often enquires about you I thought I would let you know his whereabouts.

With best regards and good wishes,

I am as ever

ROD D. LEGGAT."

The WITNESS.—I received another letter about Jan. 4, 1912. The letter you hand me is the letter I refer to. That is Mr. Rod D. Leggat's signature.

Mr. MAURY.—We offer this letter in evidence and ask that it be marked Plaintiff's Exhibit 23.

Received in evidence without objection, and is as follows:

[Plaintiff's Exhibit 23—Letter, Rod D. Leggat to  
Charles D. McLure, January 4, 1912.]

"Butte, Montana, Jan. 4, 1912.

Mr. Charles D. McLure,

Phillipsburg, Mont.

My dear old Friend:

As you will see by the date of this it is time for

me to see that you get the proper New Year's Greeting. May you and yours have a Contented (which means happiness), prosperous and joyous year in this 1912. Sorry you did not wire me so my wife and I could meet you all.

I got the following telegram at one o'clock to-day:

New York, Jan. 4, 1912.

[169—111] Rod D. Leggat, Butte, Mont.

Proceed to get offers on the three claims as negotiated. Am leaving for Butte to-night.

N. MASON RABURG.

Now this means strict business and absolute security. I wrote you to write me your terms of payments. I insist on not less than 10% being paid on deeds in escrow. You did not answer that letter. Will just say that if this deal is made known somebody or outfit will be knocking it. So be wise.

Somehow I have confidence that it may go through, so you will please let me carry it through at your dictation, but be liberal as to terms, for time will be the essence of the instrument.

The claims are the Eastern, Ready Cash and the Meighan, first 200,000, 2d 100,000, 3d 25,000, not less than 10% deed in escrow. Other payments as agreed hereafter.

I think you had better send me a written option in my name for 10 days for the Eastern and I will get Driscoll's and John Johns. You will see by the copy of the telegram that he expects me to have these options. So send it to me by return mail. Then would like to have you come over Monday or Tues-

(Testimony of Charles D. McLure.)

day. This will give you time to get your family settled. We must have absolute secrecy in the matter.

Yours sincerely,

ROD D. LEGGAT."

[170—112] The WITNESS.—I spoke yesterday of Mr. Leggat having told me that he would have been embarrassed at having signed an option. That was the first option that was given to Wolvin and Hayes. Exhibit "A" to which you call my attention, Plaintiff's Exhibit "A," is the instrument to which I referred when I spoke of Mr. Leggat's expressing the idea that he would have been embarrassed. My bill of complaint recites that I was present at the sale. I was not present. I had asked Mr. Leggat to go up there, and I thought that was sufficient and I didn't go.

This is the paper, this option, Plaintiff's Exhibit "A," that Mr. Leggat referred to when he said he didn't care for my check; put him in a position if anything happened to me of him signing that paper without having any authority any more than the confidence that existed between us; he would have had considerable trouble explaining and making good that paper. That was not the only time that took place, that is only one time, but then we would straighten up and substitute for them our deeds, and he has always referred to it several times in the form of negotiations. This Raborg matter was something similar to that; he was the president of the

(Testimony of Charles D. McLure.)

State Savings Bank.

Mr. Leggat did not refuse to recognize my ownership until I had tried to get him several times; he was up at Col. Butler's, and my son had sold the property—practically sold the property; he had a cash offer, which I had accepted, forty thousand dollars for two claims. The claims were the Eastern and the Ouichita. That forty thousand dollars was not for the full claims, just for the interests I owned.

I will now describe in my own way what took place between Mr. Leggat and myself. I tried several times to get him. I had written a note out there, but couldn't find him, telling him about my son telegraphing me (there at Col. Butler's) and [171—113] finally I wrote a note and sent it out there—it might have been my son or somebody else, I can't say, I can't remember this, but I sent a note out there to Col. Butler and asked him to give me Mr. Leggat's address, that there were some papers of importance that I wanted to see him about in Montana, and I got the note back saying, from the nurse, that Col. Butler was quite ill, and that was the reason I got no letters from Mr. Leggat. I had asked for his address, and they went around it without giving me a location. Finally I did find out—he used to come down town—and a friend of mine saw him and reported it to me, so I sent a messenger out then and told him to see Mr. Leggat and to stay there until he did, and Mr. Leggat came down. That was in March, I think, or April of this year, he came to the



(Testimony of Charles D. McLure.)

hotel rooms. I asked him to come to the hotel, because the office was small, and I wanted to see him at the hotel where we could get a nice lunch; he was not very well, and I was not myself very well, so I had *had* room 511 in the Jefferson Hotel, and Mr. Leggat came down there and he missed me first. I think that time in room 511, and I didn't get to see him, and I went to the office; I didn't go right away, but he went to the office and he said to tell me to ask for him. They said I was not in. After I came down I sat down in the rotunda and waited there for a while, but he did not show up at all. About half past eleven o'clock I got anxious and I went down to the office, and I found he had been there and the next day I sent another messenger out there and Mr. Leggat came down and we had a meeting up in the room, 511 Jefferson Hotel. I helped Mr. Leggat into the room and helped him off with his coat and he sat down and I said, "Rod, I have sold the property out, the Eastern and the Bland for forty thousand dollars, and I want you to make a deed." He hesitated for a moment and finally he said, "It is my property." Well, that stumped me completely, and I says, "What do you mean?" And [172—114] he says, "I bought the property and it is my property." Well, I was completely dumfounded at that position, because always before that, never at any time—of course there was never a time when there was an actual sale made—but never before that did he ever intimate that it was

(Testimony of Charles D. McLure.)

not my property and that he would not make a deed if I called on him to do so. I was, as I say, quite surprised and I was a little bit affected, and I says, "Rod, you can't do that thing to me, you don't mean to act that way toward me," and he says, "I am going to hold the property." No, then he says, "I have sold the property," and I says, "Do you mean you have sold the Eastern, the Bland and the Ouichita," and he says, "Yes," and I says, "Who to" and he says, "That is my affair." I says, "What did you get for it," and he says, "That is my business." Well, I stepped up to him and I reached out my hand and put it on his shoulder, and I says, "Rod Leggat, you and I have been friends for thirty years; I have been your friend when you needed one. In all your troubles in your brother's estate"—he had some trouble there in Butte with his brother—"I stayed with you, and I say to you now you are a damn scoundrel, and that judgment was just and everything that Leggat said about you is true, and after I got through talking he straightened up and says, "You are very bitter," and I says, "Not half as bitter as the case requires," and he started up for the door—the room had a bath room and there was a closet on the other side and I stepped in front of the bath room the door to which he was headed, and I says, "Mr. Leggat, go back and sit down." He says, "I won't." I says, "You will, go back and sit down." I said, "Sit down," and he turned and sat down, and I says, "Mr. Leggat, I want to apologize for putting my hands on you, for I realize you are not

(Testimony of Charles D. McLure.)

yourself; I don't believe you could act [173—115] this way if you were yourself; now I want you"—I says, "we are going to have an understanding in this matter, if this means a fight between men that have stayed together for years." I says, "I want you to take this matter with you and in your bed to-night and in the watches of the night come back and give me an answer in the morning," and I says, "Will you do it?" and he says, "yes," and I says, "Will you come to this room 511?" and he says, "yes," and I says, "I will be in this room from ten o'clock to twelve," and I says, "When will you come," and he says, "at eleven o'clock." I says, "If you are not able to come to-morrow, you come up the next day." He got up, and I helped him on with his coat and opened the door, and I says "good-day," and that was the last interview I had with him. The next morning, which was the morning he was to have been down, I got a messenger—I got up early and went down to my office—I got a messenger and I told him I want you to write a note to Mr. Leggat, and I told him, I want you to take your bicycle and go down there, and I will pay you for it, go to Col. Butler's and see Mr. Leggat, and the note was, "Rod, you have promised to be up at my office about eleven o'clock; don't forget it; I will be there." I received a reply from that note that Col. Butler was very sick, which was true, for he was quite ill, from Mr. Leggat. Have you the reply there? Of course, that led me to think that he might be down the next day, so I



(Testimony of Charles D. McLure.)

paid no attention to it, and that night I went back to the hotel, and I found this note, this note from Mr. Cater; I don't know if it is Carter, or not, but anyhow it was a note, and I didn't hear any more of Mr. Leggat for quite a while after that.

The deed that I requested was to be made and deposited in the Miners Savings Bank & Trust Co., at Butte. About any amount that I owed Mr. Leggat, why, of course, I was to pay [174—116] him right down there, but he told me he had sold it and he could not make a deed then, and it left me, of course, in a position like one is where he had to take some action. I was able to pay \$1,004.15 with interest at the rate of eight per cent per annum from the 6th day of June, 1913, until the 7th day of April, 1915. I could get that much cash that day. I can't say whether Mr. Leggat knew of my willingness to straighten up that old transaction in that way or not; I didn't get to the point of making the offer, because as soon as he told me it was sold, that he had sold everything, and said that the property was his, there was no use of my doing anything else than to try and protect myself. I was ready, of course, to pay it, but I can't say that I did or did not offer to pay it, and as I say, I was rather stumped, as I expressed it, I was dumfounded at the position he took. He did not show up pursuant to the agreement. Knowing he had sold it, I went to Mr. Schofield, my attorney, and told him about it, and he says, "the only thing you can do, you can sue for the property here, or you



(Testimony of Charles D. McLure.)

can bring a suit for an accounting," and that suit was instituted in St. Louis. I first learned that Mr. Leggat had not sold the property when this deposition was taken, when he was put on the stand. I was present at the taking of the deposition. And in that deposition the question was asked, if Mr. Murray was there, and he said that Mr. Murray was not there; and the question was also asked if he had sold the property, and he said he had sold his interest and got his money, but that he had the interest he had brought under the judgment, and still had it. And when we found that was the case we dismissed the suit.

Then I wired Mr. Templeman's office and advised to institute proceedings at once to protect myself; I simply wired them to bring suit so as to protect myself against an innocent purchaser. That is the present suit that is now on trial, the suit that was brought. I was in St. Louis, and my attorneys [175—117] were in Butte when that suit was brought.

Q. Now, why did you offer to sell the property for forty thousand dollars, I mean the interests in two of these claims?

A. Well, the first interview I had with him in St. Louis I offered it for one hundred thousand dollars. That interview was in February or March, I can't say, it might have been as early as the latter part of January.

He was perfectly willing to make a deed if I had

(Testimony of Charles D. McLure.)

made my sale. His reply was, you have come down considerable; I hadn't sold the property, I had only a chance to sell, it was simply a negotiation for a sale. That conversation was at my office, I think, in St. Louis, at 821 Security Bldg.

I came down in my price to forty thousand dollars for my interest in the two claims because I was in considerable need; I needed money, and I thought it would be cheaper for me to make that sacrifice than to make it somewhere else. I considered it a sacrifice, and his reply was, "You have come down considerably on the price"—the regular option was one hundred and thirty-five thousand dollars, that was for the three claims, though. It was Mr. Leggat who said "you came down considerably, Mr. Rod D. Leggat."

I have seen Mr. Leggat in Butte several times; saw him on the street and I saw him at the hotel here Sunday night, in the Placer Hotel here in Helena. He was in the rotunda, sitting there smoking with Mr. Alexander Leggat and Mr. Nolan, I believe. I think he came from Butte to Helena Sunday afternoon, last Sunday. I have not seen him this morning. I saw him yesterday, saw him last night up until about half-past eight o'clock. He was in the rotunda talking and smoking.

I am now ready, able and willing to pay Mr. Leggat the sum of either one thousand four dollars and fifteen cents with [176—118] interest at the rate of eight per cent per annum from June 1, 1913, or

(Testimony of Charles D. McLure.)

the sum of five hundred four dollars and fifteen cents, whichever may be adjudged. I am able, ready and willing to pay it. I want to say before I get through that when I reached out and put my hand on Mr. Leggat, that after I had said what I did, I says "Mr. Leggat, I want to apologize for putting my hand on you," when I stepped in front of the door and compelled him to sit down I told him, "I want to apologize again for putting my hand on you." I did it when he was going away.

I hold the monthly accounts rendered me by Mr. Rod D. Leggat with reference to the Elvina Mining Co. and the Chili Co. I offer them now to Mr. Leggat's counsel for inspection. They are here. They show my expenditures in these transactions, roughly the reports of Mr. Leggat.

Cross-examination by Mr. SCALLON.

Q. How long had you been in Butte prior to June 6, 1913, the date of the sheriff's sale, how many days—how many days had you been in Butte prior to that time?

A. I came over, I think, in May; I started to explain it by stating that I was the president of the company, for the Granite Company, and we had something like fifteen or twenty thousand dollars worth of ore, on the morning there was a prospect of trouble and a railroad strike on the electrical construction at Deer Lodge, and also the reported troubles in the Miners Union in Butte; our shipments went from Phillipsburg to the yards at Drummond,

(Testimony of Charles D. McLure.)

and from there to the yards at Garrison and—

I was there first, that is, on the date of the sale. I was in Butte prior to that time. I was going to try to [177—119] tell you for how many days, but I can only locate it by the knowledge of these strikes. I came over several times to see what the situation about the shipments was, and I stayed in Butte a while, and then I went to Deer Lodge and stayed at night, because of the excitement in the streets and I could not sleep, so I went to Deer Lodge at night and came back in the morning. I am talking of last year, in June, June, 1914, June 10, June, 1914.

The date of the sheriff's sale when the property was sold was in 1913, that was two years ago in June. I was over in Butte nearly all the time. I was there, I think, somewhere about the 26th or 27th of May, before the sale. I am inclined to think I came from St. Louis. I was there until along in June, right along. To the best of my memory that was for a period of about two or three weeks. I stopped at the Finlen Hotel. I allowed this matter to go along until the very morning of the sale, the payment, because I really thought that I could redeem it up until the last moment before the sale by the sheriff. I can't tell you just exactly why I allowed it to go until half-past eight on the mornning of the day of the sale instead of going there the day before. I can't tell you exactly why I did that at this time, further than that I knew I had the money to pay it. I had the money at the time. It was in the Miners Savings & Trust Co. bank, and also in Phillipsburg. I don't



(Testimony of Charles D. McLure.)

know whether I told the banking people about it; I may have, I am not sure. I had some money in my name at the bank at Phillipsburg. At the Miners Savings Bank I had about twelve or fourteen hundred dollars. I haven't my book with me. I didn't specify to the sheriff on what bank I would give my check. I would have given it on the Miners Savings Bank & Trust Co. I didn't go the day before and get my check certified, because I thought there would be no [178—120] trouble in taking my check.

Q. Now, when the sheriff refused to take it, did you telephone the bank and ask it to certify the check?

A. I told you that was before eight o'clock.

Q. I know, but between nine and ten o'clock, did you telephone the bank?

A. Why, I came down at nine o'clock and I saw Mr. Leggat; just a little after nine o'clock, and he told me that they would take his check, and he said he would attend to it. I sent for him by telephone. I telephoned myself from the office. I was sitting by the front door in the Finlen Hotel and watching the street, and before he crossed the street I met him on the outer side of the street, and I said to Rod, "They refuse to take my check." I was anxious to avoid the costs of the sale by the sheriff. I did not ask Mr. Leggat to go up and pay the sheriff, pay this judgment, and save the sale and save its costs, because it was about half-past or ten or fifteen minutes after nine o'clock, and I suppose it was because he

(Testimony of Charles D. McLure.)

had told me it had to go to sale, the sale had been advertised, and I don't think that Mr. Leggat could stop the sheriff from selling. I don't know that it is a right of a defendant to bid at any time, or didn't know either. I could have paid the judgment, but I don't mean to say that I could have stopped the sale. If I had gone down with you I presume the sheriff would have stopped the sale. I believe if I had paid the judgment and the sheriff had accepted my check, it would have been stopped, the sale would have been stopped. If he had accepted the money it would have been stopped. I did not ask Mr. Leggat to go and rustle the money for me; he volunteered to do that; he says, "They will take my check. I will attend to it." I did not insist upon his going and paying off the sheriff's claims at once and stopping [179—121] the sale. I didn't ask him to do that. I just told him that they would not take my check, and his reply was, "They will take my check, and I will go up and attend to it." That is exactly what he said, and that was the object and the purpose. He did say he would buy it up for me. I understood that the sale was going to take place—if you understand, a part of that property belonged to Mr. Leggat and never was in my name.

I don't think I endeavored to get him to pay this judgment so as to stop the sale and avoid these costs. I don't think I endeavored to do that either, because some of the costs were already incurred, and Mr. Leggat knew what my responsibility was, and he

(Testimony of Charles D. McLure.)

said he would pay the debt for me, and he said he would give his check and pay it up. At that time he told me he would pay it for me. That was equivalent to saying that the sale would be allowed to take place. I did not object to that. I did not ask him to bid it in for me; he volunteered to do it. He says, "They will take my check." As to why I was willing to allow the sale to take place and incur these extra costs, I can't say anything more than I supposed the situation was satisfactory to me; I don't know what the costs would have been; but if I had employed an attorney to go there it would have cost me as much in attorney's fees as it would for sheriff's fees. I would have gone to the sheriff's office at half-past eight in the morning for the purpose of saving the costs. I had not figured out the costs. I did not ask the sheriff how much the costs would be; I expected it certainly would have cost us something. I had been in business for a long time and I had some experience in sheriff's sale before. As to bringing suits, I don't think I ever sued more than one man that I remember of.

[180—122] I saw Mr. Leggat in St. Louis this year after his illness in Butte, after he had that stroke that I spoke of. I do not know that he was most of the time there in St. Louis under the care of a nurse. I went out to see him, and he was not under the care of any nurse. I saw him at Mr. Butler's place. That was soon after he came there. It was in October, I think, probably November, but soon after I first learned

(Testimony of Charles D. McLure.)

he was there, and when I learned that he was there and he didn't come to the office, I imagined he was sick, because generally he came to the office, and I went out and called on him; that was early in the fall, and he was not under any nurse at that time. I think I know that, because if he was he was down town very frequently; I know I took dinner with him two or three times; and he would read the papers that I received.

When I first left here in October I told him I was going to try to raise some money and I wanted him to go to St. Louis, and right at that time I had approached Mr. Templeman to see if he couldn't sell the properties. That was as early as the 10th of October. I think it was in February that I told him about the price and he said that I was coming down in my price. I told him that I had put a hundred thousand dollars on it. That was not for all of the properties, just two of the interests—no one hundred thousand was for all three of them, for the Bland, the Ouichita and Eastern interests, one hundred thousand dollars cash for these three interests; that was it. I did not put a price of forty thousand dollars on the Eastern. My son came out here and he was offered forty thousand dollars cash and he wired me about it and that was what I finally did accept for the Ouichita and the Eastern. Not the Bland and not the Elvina, just the Eastern and the Ouichita. When I told Mr. Leggat [181—123] I put the price of one hundred thousand dollars on it, he sim-



(Testimony of Charles D. McLure.)

ply said "You have come down considerable" and I told him at that time "You have got your money"—he told me he had sold all of his. The first I heard of it was from Mr. McQueeny, and he told me that he had got his money, or had hypothecated his interest, and he got all his money; I suppose he told me that a half a dozen times in 1914, last year. I understood that he had the money from Stewart White. He was an old friend of his. I had never met Mr. White but once, but he was an old friend of Rod Leggat's. My understanding was that Stewart White advanced him the money on the property, I can't say whether he did or not, but from his statement to me he did. I don't know about his having deeded this property to Stewart White on account of this advance, I didn't ask him. I understood that he had hypothecated it to Mr. White; that was as I understand it. It occurs to my mind at this time it was before the final failure of the Butte & Superior Co. to take the property, but the option was still in existence and I thought from what he said that he hypothecated the payments that were to come to Stewart White. I never asked him whether he was to deed the property to Stewart White later on. I never knew that he deeded to White until after the suit was started, and then when I made up my own records I found that the records showed it was deeded to White. I didn't understand him to say that he had sold the property to the Butte & Superior Co. or Wolvin and Hayes, or any of these people. I don't think he told me that.

(Testimony of Charles D. McLure.)

In this interview in room 511 of the Jefferson Hotel, when he told me he had sold the property, he referred to the whole property. I asked him plainly "Have you put any bonds on it?" And he says, "I have sold it." I says "Who to?" and he says "That is my affair." "What did you get for it?" "That is my business." [182—124] Then it was I put my hand on him and I says, "Leggat"—and he straightened up. That was about all. I am sure that was all that happened, and I didn't take it off either. He did not give way under it, he straightened up. I don't think he was as sick then as he is now, but I think he is as well now as he will ever be, and as well as I am to-day. He does not speak as fluently as I do, but he hears better than I do. My deafness is not an old-time affair, it came on me last year. I think I was at Col. Butler's room two or three times in the fall and winter.

Q. Was there any discussion of the price between you and him, I mean on the price you were putting on the property in these conversations in St. Louis when you told him first that you had put a price of one hundred thousand dollars on it?

A. I don't think there was from the fact—I think that telegraph from Mr. Templeman read "I have two parties interested." He said "There are two parties here that are interested, what is your lowest cash price" and my reply was "One hundred thousand dollars." In my interview with Mr. Leggat there was no discussion between us about the price,

(Testimony of Charles D. McLure.)

nothing more than that, because I had no option, and no chance of making a sale, and he simply said "I came down on my price." That was before I had wired Mr. Templeman.

Q. Did you explain to him why you were selling this property, or why you were willing to let it go at that low price?

A. Well, he told me already that he had sold his a long time before that and he had got his money out of it, a year before that.

He had got his money in the Eastern. There was no other under contemplation of sale in which he was interested. That hundred thousand dollars was for all three of the properties, that is, the Bland, the Eastern and the Ouichita. The Elvina [183—125] interest has never been under consideration. It did not include the Elvina. I think you may see that telegram I sent to my attorney here to bring suit, I have got it here. If I haven't I will bring it to you. I had talked this matter over with Mr. Schofield before bringing suit. I think he is familiar with the whole situation, I mean learned about that. He has been in my office for ten years. I mean by that, he has been employed there. He has not an office in the same building as mine. But I did tell him all about these transactions between myself and Mr. Leggat. It was not necessary to tell about each conversation with Mr. Leggat, because Mr. Schofield and Mr. Mellor are cronies and take their lunches together every day, and he is my attorney and Mr. Mellor is my sec-

(Testimony of Charles D. McLure.)

retary. I don't think I ever told Mr. Schofield the interview with reference to this matter of the sheriff's sale and the purchase of the property by Mr. Leggat. He had no information, except the information to bring this suit, that Leggat had sold the property. I went to him to bring the suit. I told him all the circumstances, that Leggat had said he had sold the property. I think I read the complaint that he drafted.

Q. Now, calling your attention to the allegations of that complaint, I will read this to you, unless you prefer to read it yourself?

A. No, you go ahead and read it, you can see better than I can.

Q. Your complaint says, "This plaintiff and said defendant has been in negotiations for the sale of said properties and the interests of plaintiff and defendant, respectively, thereto, and by and through the interventions of said defendant, said properties were bonded to certain persons in Montana, whose names are now unknown to plaintiff, at and for the following prices, to wit, for the full title to the said Eastern lode [184—126] mining claim the sum of two hundred thousand (200,000) dollars; of which plaintiff was to receive the sum of one hundred fifty thousand (150,000) dollars, and said defendant the sum of fifty thousand (50,000) dollars; and for the interest of this plaintiff in said Ouichita lode mining claim the sum of twelve thousand (12,000) dollars; that said negotiations were conducted by the said



(Testimony of Charles D. McLure.)

defendant at the instance and request of this plaintiff and such steps were therein had that there was paid to this plaintiff on account of, and as earnest money on the purchase of said interest of this plaintiff in such property, the sum of forty-five thousand (45,000) dollars and to the said defendant, on account of his interest in the said Eastern Lode mining claim, the sum of fifteen thousand (15,000) dollars, and that thereafter said sale was abandoned by the prospective purchasers thereof, and the bonds theretofore given cancelled and for naught held." Do you remember of reading that allegation?

A. Well, that is no different from what I testified to here.

Q. Do you remember of reading this paragraph? "Plaintiff further states that at the request of the said defendant and in furtherance of resumption of said negotiations then being conducted by plaintiff and defendant for the sale of said mining properties and the interests of the parties hereto, respectively, the full title to the interest of this plaintiff in and to said properties was placed in the name of said defendant so that upon completion of negotiations for the sale thereof the title thereto might be quickly and effectively passed to the prospective purchasers thereof, with whom said defendant and this plaintiff were negotiating for the sale of same." Do you remember that?

A. That is practically what I testified to, I don't think it [185—127] differs very much from my testimony.

(Testimony of Charles D. McLure.)

I think I read that statement all right, I am not sure, but I think I did; but that is the fact whether I read it or not.

Q. Then in the next allegation you say "Plaintiff further states that at the time of placing the title to the interest of this plaintiff in the name of said defendant, as aforesaid, this plaintiff had full confidence in the integrity of the said defendant, and in his assurances and promises that the interest of this plaintiff in said property would be held by the defendant for the plaintiff, and fully accounted for to plaintiff on any sale thereof by defendant, if and when this plaintiff requested sale and disposition."

A. Well, I think that is my testimony here.

I think I read that in the complaint. Up to the interview I told you of at 511 Jefferson Hotel, I had not supposed for one moment that he had sold it. It was after that that I brought suit in St. Louis. He told me he had sold the property. When he testified in court that he hadn't sold it I realized that I had no grounds for suit, and the suit was dismissed for the reason that the Court had no jurisdiction of the property, and the suit had to be brought here.

Q. Meanwhile did you hear from your Montana attorneys as to whether they brought suit or not?

A. I don't know as to that, as I say, when Mr. Leggat did not come down to meet—the understanding we had had, he was to come down that day, and if he was not able to come that day he was to come the next day, and when he didn't come I realized at once

(Testimony of Charles D. McLure.)

—I had had trouble enough to find him—I had to protect my interests some way or other.

I am not sure that I was informed by my attorneys by [186—128] telegram of the bringing of the suit, but I am rather inclined to think that I asked them to answer, but I don't know whether it was that day that I got the answer or not, but I got an answer saying that suit had been commenced and some papers from the record showing the proceedings, or notice of the suit. A *lis pendens*, I mean. I understand what a *lis pendens* is, as the lawyers call it. I do not think I heard of the bringing of the suit before I took the deposition of Mr. Leggat in St. Louis. I am pretty sure I did not. It may have been possible that as soon as I got his deposition, that very day the deposition was taken in St. Louis, that very night, a wire may have been sent to Montana to bring the suit. My impression is that I telegraphed my attorneys in Montana after the deposition of Mr. Leggat was taken. I may have been possible, the paper you have there was a copy that was first made, and the suit was finally altered and there is some minor difference between the copy you have and the copy that was filed. Coming back to the time of the sale, that is two years ago in June that we have been speaking about, I am not sure that any member of my family was stopping with me at the hotel. It is possible one of my boys, or one of my daughters was there, I don't know. I have no positive recollection about this, but I am inclined to think that my son,

(Testimony of Charles D. McLure.)

William, was there, but I am not sure, but I am inclined to think that. That was the young man who was here on the stand yesterday. I have four sons out in Montana. I told you, speaking of last year, that I came on to Butte in connection with the shipments from the Granite Mountain mine and that occasionally I stopped at Deer Lodge. I think it was in May or June. I think I came over—my impression is I came over about the 15th of May, and I may have come here to Helena to see Frank Smith [187—129] and gone back to Butte and there in Butte there was soap-box speakers down there, and big crowds on the street, so I went down to Deer Lodge to sleep, came down to Deer Lodge and slept at the hotel and would go back the next day to Butte. I slept at the Deer Lodge Hotel. I slept there several times; I made a trip down there in preference to sleeping in Butte. I do not think I had my family at the Finlen Hotel at that time. I didn't bring the Finlen Register, I suppose that would show. I was going backward and forward from Butte, between Deer Lodge, Butte and Helena. I was at the Placer, or the Finlen or the Deer Lodge Hotel.

To get back the property, I want to pay what is just. I assume that Mr. Leggat won't question that check, if he does I will pay the full amount that he paid. Now don't misunderstand me, I have no animosity toward Mr. Rod Leggat whatever.

Redirect Examination by Mr. MAURY.

The WITNESS.—Mrs. McLure's age is sixty-



(Testimony of Charles D. McLure.)

eight, I think. Last fall, when I went to St. Louis, from Montana, I am not sure whether I left Butte on the tenth or twelfth, but it was either one of these days, I went to Mr. Leggat and asked him if he would go to St. Louis with me, and he says, "I can't go, I have got some things to do here" and I said, "I will stay two days if you are able to go then, and you can travel with me, Rod." That, I think, was October 14th, of last year. I am not sure how soon Mr. Leggat followed me, I don't know. I only know the dates roughly by thinking it over. I think the letter for him must have come to the office about two weeks after my arrival in St. Louis. He did not call for that letter, I mailed it to him. Yes, I had some telephone communications with him to know that he was [188—130] there. Mr. Mellor called me up and said if I wanted to see Mr. Leggat at that time. I think that was my first call; I went down to see him. I cannot say how long he stayed there, the last time he was in St. Louis. I don't know. He was down several times; he would come down and we would go out and take lunch together. We did that several times and I think that once we went out to a picture show together. He was there until March or April.

Mr. SCALLON.—Will you look at this paper which I now hand you and state whether that is your signature? A. Yes, sir.

Mr. SCALLON.—I will read it into the record. "Butte, Montana, August 3, 1912. Received from Wolvin & Hayes the sum of fifteen thousand dollars,

(Testimony of Charles D. McLure.)

same being as payment upon a three-quarters ( $\frac{3}{4}$ ) interest in the Eastern quartz lode mining claim covered by option to Wolvin & Hayes." That was your authority for that twenty thousand dollars that was deposited in the State Savings Bank at Butte?

A. Yes, sir.

The money was deposited in the bank there under that escrow agreement. When I deposited the deeds it was turned over to me. I got the money directly from the bank. I didn't get it from Mr. Leggat or through Mr. Leggat.

Mr. MAURY.—We offer in evidence certified copy of the sheriff's certificate of sale on execution, which bears the certificate of the recorder of Silver Bow County, Montana, and the documentary war revenue stamp cancelled. We offer also sheriff's deed under execution, a certified copy, with the proper revenue stamps cancelled.

Sheriff's deed, marked Plaintiff's Exhibit 24, and sheriff's certificate of sale, marked Plaintiff's Exhibit 25, [189—131] received in evidence without objection, and are as follows:

**[Plaintiff's Exhibit 24—Sheriff's Deed, June 10, 1914, Sheriff of County of Silver Bow to Rod D. Leggat.]**

**SHERIFF'S DEED UNDER EXECUTION.**

THIS INDENTURE made the 10th day of June in the year of our Lord 1914, between Tim Driscoll, Sheriff of the County of Silver Bow, State of Montana, the party of the first part, and Rod D. Leggat

of the said County of Silver Bow, of the party of the second part,

WHEREAS by virtue of writ of execution issued out of and under the seal of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, tested the 14th day of May, A. D. 1913, upon a judgment recovered in the said court on the 18th day of April, A. D. 1913, in favor of Ira T. Wight et al., and against Chas. D. McLure, to the said sheriff directed and delivered, commanding him that, out of the personal property of said judgment debtor in his county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor on the 6th day of June, A. D. 1913, or at any time afterwards; and whereas, because sufficient personal property of the said judgment debtor could not be found, whereof said sheriff could cause to be made the moneys specified in said writ, the said sheriff did, in obedience to said command, levy on, take and seize all the right, title, interest and claim which said judgment debtor so had in and to the lands, tenements, real estate and premises hereinafter particularly set forth and described, with the appurtenances, and did on the 6th day of [190—132] June, A. D. 1914, sell all the right, title, interest and claim of the said judgment debtor in and to the said premises, at public auction in front of the courthouse in the City of

Butte in said County of Silver Bow, between the hours of nine in the morning and five in the afternoon of that day, namely at ten o'clock A. M., after having first given due notice of the time and place of such sale by publication according to law, at which sale all the right, title, interest and claim of said judgment debtor in and to the said premises were struck off and sold to the said party of the second part for the sum of one thousand and four and 15/100 dollars, legal money of the United States of America, the said party of the second part being the highest bidder, and that being the highest sum bid for the same, whereupon the said sheriff, after receiving from said purchaser the said sum of money so bid as aforesaid, gave to the said parties of the second part such certificate of said sale as is by the law directed to be given, and a duplicate of such certificate was duly filed by said sheriff in the office of the Recorder of the County of Silver Bow; and whereas, twelve months after said sale have expired without any redemption of the said premises having been made;

NOW THIS INDENTURE WITNESSES that the said Tim Driscoll, the sheriff aforesaid, by virtue of said writ, and in pursuance of the statute in such cases made and provided, for and in consideration of the said sum of money, to him in hand paid as aforesaid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and



confirm unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest, and claim which the [191—133] said judgment debtor, Chas. D. McLure had on the said 6th day of June, A. D. 1913, or at any time afterwards, or now has in and to all that certain lot, piece or parcel of land, situated, lying and being in the city of Butte, county of Silver Bow, State of Montana, and bounded and particularly described as follows, to wit:

The Elvina quartz lode mining claim situated in Silver Bow County, Montana, lot No. 258, situated in section one and two, township three north, range eight west in Silver Bow County, Montana, patent for said mining claim being of record in Book A of United States Patents at page 309.

The Eastern quartz lode mining claim, Survey No. 1230. The Bland quartz lode mining claim, Survey No. 1160, the Ouichita quartz lode mining claim, Survey No. 1229, all in Silver Bow County, State of Montana.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to have and to hold said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, as fully and absolutely as the said sheriff can, may or ought to, by virtue of the said writ and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same.

IN WITNESS WHEREOF the said sheriff, the

said party of the first part, has hereunto set his hand and seal, the day and year first above written.

(Signed) TIM DRISCOLL,

Sheriff of the County of Silver Bow, Montana.

Signed and delivered in the presence of

HUGH LYNCH.

ANDREW QUILTY.

Acknowledged.

Filed June 11, 1914.

**[Plaintiff's Exhibit 25—Sheriff's Certificate of Sale  
of Execution, Dated June 6, 1913.]**

**[192—134] SHERIFF'S CERTIFICATE OF  
SALE ON EXECUTION.**

**SHERIFF'S OFFICE, SILVER BOW COUNTY,  
STATE OF MONTANA.**

I, Tim Driscoll, sheriff of the County of Silver Bow, State of Montana, do hereby certify that under and by virtue of execution issued from out the district court of the First Judicial District of the State of Montana, in and for the said County of Lewis & Clark, in a certain action therein pending in said District Court, at the suit of Ira T. Wight et al., plaintiff, against Chas. D. McLure, defendant, duly certified and attested to me, under the seal of the said district court, the 14th day of May, A. D. 1913, and to me as such sheriff, duly directed and delivered; whereby I was commanded to make the sum due on the judgment in said action, for damages, with interest and costs, and accruing costs and expenses of sale, to satisfy said judgment out of the real property in

the above-named county belonging to Chas. D. McLure, the said judgment debtor; and that on the 6th day of May, A. D. 1913, at 10 o'clock A. M., at the courthouse door, in Butte City, in the said County of Silver Bow, I duly sold at Public Auction, according to law, and after due and legal notice, to Rod D. Leggat, who was the highest bidder therefor at such sale, for the sum of one thousand and four and 15/100 dollars, lawful money of the United States, which was the whole price paid for the property as sold, all of that certain real property lying and being in the above-named County of Silver Bow and described as follows, to wit:

All the right, title and interest of the defendant in and to the following described real property, to wit:

The Elvina Quartz lode mining claim, situated in Silver Bow County, Montana, lot No. 258, situated in secs. one and two [193—135] township three north, range eight west, in Silver Bow County, Montana, patent for said mining claim being of record in Book A of United States Patents at page 309.

The Eastern Quartz lode mining claim, Survey No. 1220.

The Bland Quartz Lode mining claim, Survey No. 1140.

The Ouichita Quartz lode mining claim, Survey No. 1229, all in Silver Bow County, State of Montana.

And I do further certify that the above-named property was sold in one lot or parcel as herein de-

scribed, after offering each claim separate and receiving no bid, and that the said sum of one thousand and four and 15/100 dollars, lawful money of the United States, was the highest bid made and the whole price paid therefor, and that the same is subject to redemption at any time within twelve months from date of said sale, pursuant to the statute in such cases made and provided.

Given under my hand this 6th day of June, A. D. 1913.

(Signed) TIM DRISCOLL,  
Sheriff of Silver Bow County, Montana.

By Hugh Lynch,  
Deputy Sheriff.

Filed June 6, 1913.

Judgment recovered on the 18th day of April, 1913.

Mr. RASCH.—I understand that this case was set down for hearing on this date for the purpose of introducing proof on behalf of the complainant, and that the proof on behalf of the defendant may be taken next October, and so far as we know now that is all the proof available at this time, and particularly all the proof that will be adduced on the part of the complainant, and that the case may be continued to some time in October, suitable to your Honor, for the purpose of taking the proof of the defendant, and for such other proof on the part of the complainant as may in the meantime be [194—136] decided upon. We have no objection to the plaintiff offering further proof.

The COURT.—If there be no objection the case



may be reopened on the part of the plaintiff at that time.

Case continued to October 21, 1915, at Butte, Montana.

Monday, December 6th, 1915, ten o'clock A. M.

Before Hon GEO. M. BOURQUIN, Judge.

Mr. MAURY.—We offer in evidence now a certified copy of the execution in the case of Wight & Pew versus Charles D. McLure, from the district court of the First Judicial District. We have a certified copy, and there is a return on the execution too.

The COURT.—It will be admitted under the usual rule.

(Paper received in evidence, marked Pltfs. Ex. 1.)

Mr. MAURY.—We rest.

**[Testimony of Hugh Lynch, for Defendant.]**

[195—137] HUGH LYNCH, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. NOLAN.

The WITNESS.—My name is Hugh Lynch. At present I am timekeeper. I reside in Butte. In June, 1913, I was chief clerk to the sheriff in this county, that is Sheriff Driscoll. I conducted the execution sale in the suit of Wight & Pew against Charles D. McLure. I don't remember the date. At that time I had an assistant in the office, Mr. Luke Noonan. I know Mr. McLure. I do not remember whether or not he came to my office on the 6th day of June, 1913, concerning this sale on execution of Wight & Pew against him. I was there upon that date. I opened the office at nine o'clock every morn-

(Testimony of Hugh Lynch.)

ing. Either myself or Luke Noonan opened the office of the sheriff every morning. We were the only ones that knew the combination of the safe where the books were kept. The sheriff's office itself was opened by either myself or my assistant, Mr. Noonan. I conducted this sale on execution. I remember that Mr. Leggat bid the property in. Nothing whatever was said at the sale by Mr. Leggat concerning his bid. Nothing was said to me by any person concerning for whom or for what purpose Mr. Leggat was bidding. Mr. McLure did not come to my office on that morning and offer me a check. I didn't see the gentleman around the office at all on that morning. I made out the certificate of sale. I did that immediately after the sale. I had to make out two of them and generally take—not being very handy with the typewriter, I don't know whether I made it out on the typewriter, or whether I wrote it out—had to write out a copy [196—138] and give one to the one that bought the property in, and also one for the clerk of the Court's office. After Mr. Leggat bid the property in, he paid for it, paid the amount of the judgment. Then I issued him a certificate of sale. I don't remember whether I issued him the certificate of sale right then or later on, I couldn't say; I think it was the same day, anyway; I don't exactly know the hour. I can't say whether he waited for the certificate or not.

Cross-examination by Mr. RASCH.

The WITNESS.—I was chief clerk to the sheriff at that time. I had been chief clerk prior to that

(Testimony of Hugh Lynch.)

time from the time Sheriff Driscoll took office, the 6th day of January, I think it was, 1912. I continued to be in that position up until, I think it was the 6th day of October, that we left the sheriff's office, the 6th day of October, 1914. I always conducted the sales whenever there was a sale to be had. I conducted a great many sales prior to the 6th day of June, 1913, and a good many since then while I was clerk. If I remember rightly I think there were five claims or four claims that were levied upon that I sold at that time under this judgment against McLure. I couldn't state which claim I offered first. The way they were in order on the order of sale, I suppose is the way I offered. I offered each claim separately first. After I offered one of the claims separately I received no bid on it. Then I proceeded to offer the next one. I offered the next one alone. Receiving no bid on that, I offered the next one. After I received no bid upon the first offer that I made on the first claim, I then offered and received no bid on the second one. I did not then offer the two together. [197—139] After I had offered each of these claims separately first and received no bids on any of them separately, then I offered them all in a bunch. I had dealings with Mr. McLure a little bit later than a year previous to that time. Just one deal. I knew the gentleman, knew who he was. Nine o'clock in the morning was when the office was opened. I remember holding the sale at ten o'clock. I stated that I didn't remember Mr. McLure coming there to see me.

(Testimony of Hugh Lynch.)

Q. When did anybody first talk to you about this sale, recently or at any other time?

The COURT.—You mean after it happened, after it took place.

Mr. RASCH.—Yes.

A. Why, I talked with Mr. McLure here one evening.

That may be six weeks or two months ago, somewhere around there. That was not the first time that any inquiry was made of me with reference to that sale. I think Mr. Nolan talked to me a little while before that. It was quite a while ago when Mr. Nolan talked to me about it; I can't remember the time; and I talked to Mr. McLure just about the time this trial was started, I think the first time, over in Helena. I think it was before this hearing commenced over in Helena, which was last June. At any rate it was approximately two years since the making of the sale when the matter was again first called to my attention. As far as I can remember I tell you everything that occurred that morning. I am giving you my best recollection of what occurred that morning, absolutely the truth. If Mr. McLure was up to the courthouse that morning at nine or approximately about that time, he didn't speak to me; there was no proposition made to me, or anything at all, before that sale. I remember Mr. [198—140] Wight, one of the judgment creditors for whom that sale was made, when he came over with the papers; I didn't know the gentleman at all; I wouldn't know him again if I saw him. I couldn't



(Testimony of Hugh Lynch.)

say whether he was present at the sale or not. The only one I remember was Mr. Leggat, being at the sale. Mr. Leggat was the only person that was present at the sale who was interested that I knew anything about. He was the only one interested in the sale that I knew anything about. There were several people going up and down the steps of the courthouse; there usually was when I held sales, but I paid no attention to them; I may have known them, but I paid no attention to them. I recollect and know Mr. Leggat was there; he was the man that bid on the property.

It was shortly after we took office that I had this other transaction with Mr. McLure. He redeemed the same property under—Mr. Noonan was my assistant at that time. When I was called out of the office and anything came in in a civil line Mr. Noonan handled it. I couldn't state whether Mr. Noonan was at the office ahead of me on the 6th day of June, 1913, or not. Mr. Noonan generally got there about five minutes ahead of me; he caught the car down that got him there about five minutes to nine.

Redirect Examination by Mr. NOLAN.

Q. Mr. Lynch, is it usual for—or I mean is it such a circumstance, when you carried on business of selling property on execution, for persons to offer their check for the judgment; is that a common proceeding?

A. It was a common proceeding, provided you called up the bank first and found out they were good for that amount of money; I always found out from the bank first.

(Testimony of Hugh Lynch.)

[199—141] I have no recollection whatever of Mr. McLure offering me a check. He didn't offer me a check.

(Witness excused.)

**[Testimony of Luke Noonan, for Defendant.]**

LUKE NOONAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. NOLAN.

The WITNESS.—My name is Luke Noonan. I am a miner; watchman now. I reside in Walkerville, Montana. I was a clerk to the sheriff of this county in June, 1913. I was an assistants to Hugh Lynch. I was engaged in that service on the 6th day of June, 1913. I am not acquainted with Mr. McLure that I know of. I don't believe this gentleman here, Mr. McLure, called on me at the office of the sheriff in June, 1913. I couldn't say that he did. He did not call on me with reference to the execution sale of Wight & Pew against him. He did not offer to me to pay the amount of the execution. I don't believe I saw him at the office of the sheriff; I don't believe I ever seen him up at the courthouse. I would get down about nine o'clock in the morning; generally got on the twenty minutes to nine Walkerville car; that would bring me into the courthouse about two or three minutes to nine. Well, as a rule the janitor generally opened the door—around there cleaning up, but I used to generally open the safe myself, if Lynch wouldn't be there I would open it. Either Lynch or myself was the

(Testimony of Luke Noonan.)

[200—142] first one in the office in the morning; generally myself.

Cross-examination by Mr. MAURY.

The WITNESS.—There were fourteen deputy sheriffs, I guess; fourteen and the undersheriff and the sheriff, I think. John C. Smith was the undersheriff on June 6th, 1914. I haven't seen him for three or four months, but I think he is working at the Granite Mountain or the Speculator. The Granite Mountain mine in this county. He was once alderman here in Butte. I think there were, besides him, thirteen deputies. I will tell you in a minute. There was fourteen, and him. Most all of them came in about nine o'clock. I couldn't say where Timothy J. Driscoll, the sheriff, was that day. I couldn't say whether he was there or not. My duties as assitant clerk to Hugh Lynch was mostly looking after the jail book and so on, answering the 'phone, and doing the clerk work when he would not be in the office. I don't think I know Mr. Pew of White & Lew. I don't think I know Mr. Wight. I couldn't say if Mr. Wight was there that day. I had nithing to do with the sale at all; Lynch looked after the sale; he always did look after that kind of work when he was present. I couldn't say whether or not any particular man came in to see me or talk with me during my term of office there; I couldn't say, but I don't believe so. I don't believe I could remember. I had nothing whatever to do with the sale of the property, no, sir, not a thing.

(Witness excused.)

**[Testimony of Rod D. Leggat, for Defendant.]**

**[201—143]** ROD D. LEGGAT, the defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. NOLAN.

The WITNESS.—My name is Rod D. Leggat. I reside in Butte City. I was seventy six years old last June. I have lived in Montana about forty-nine years. I have followed mining and merchandising. I first met Mr. McLure in Helena in '67, just met him. But I didn't see him for several years after that. Since then I have had some business transactions with him in some mines, in '88 in Butte, in the Elvina mine. That is one of the mining claims involved in this suit. In '93 and '94 I was *interested* in Sand Creek, in Madison County, this State, with Mr. McLure. I have been actively engaged in mining since '72 and '3. I have been actively engaged in carrying on mining operations since '73. It is just about a year since I quit carrying on active mining operations; just about a year; I don't think hardly that; I have not done much mining in a year, since I was taken sick, that is in the State of Idaho. Mr. McLure isn't interested with me there. It is twenty years, I guess, since I quit active mining in Butte. During the past twenty years with Mr. McLure I was interested in the Eastern and I thought in the Elvina. I carried on some negotiations with Wolvin & Hayes with reference to the sale of the Eastern. I made the deal with Wolvin & Hayes for the East-



(Testimony of Rod D. Leggat.)

ern. The others interested with me were Charles D. McLure, two-thirds, and Stuart White, one-eighth, and I one-eighth. I mean Mr. McLure three-fourths. In that transaction I made the contract with Wolvin & Hayes. I gave a bond for the—or an option for the whole property, [202—144] and agreed to get the other owners' interests; they would agree to it. I agreed to get the owners at the price I had given the bond at, at two hundred thousand dollars. Mr. McLure and T. Stuart White and myself were paid some money under that option. The money was paid to the State Savings Bank, twenty thousand dollars, the first, and that was segregated, that is, each man got what his interest called for. That was the 20th day of June, 1912. There was a second payment made on that option, forty thousand dollars, on the first day of January, 1913. That didn't complete the payments due from Wolvin & Hayes. I don't remember when it was after that, but I sold my interest to Mr. White. I think it was in June or July, something like that, of 1913. The option was finally forfeited. It was forfeited in 1914. I expect it was January, January 1st. After the forfeiture never had anything to do with the sale of the Eastern; never spoke to the Butte & Superior people about it. I did not speak to anybody else about it.

Coming down to this sale, I purchased at execution sale, on June 6th, 1913, wherein Wight & Pew were the judgment creditors and Mr. McLure the judgment debtor, the interest of Mr. McLure in the East-

(Testimony of Rod D. Leggat.)

ern, Ouichita, Elvina and Bland quartz lodes, the interest set forth in the pleadings. I first saw notice of the sale published. I seen it published at the courthouse. I saw the notice of sale. I do not recall approximately when I saw that notice published. I think two or three weeks before it was sold. I attended the sale. Before attending the sale I did not have any conversation or agreement with Mr. McLure concerning my attendance at the sale. I did not see Mr. McLure on the day of the sale. I did not see Mr. McLure before the sale on that day. I did not talk to Mr. McLure by telephone on that day. I made no announcement at the sale as to whom I represented. I [203—145] was representing myself. I did not state to any person at the sale that I was representing Mr. McLure.

I went up to the sale, and I think the sheriff was out on the street, was on the porch, and after a little while he put it up, and he called the different names; there was no bid. He called the different names of the Eastern and the other claims, and there was no bid, and then he put them all up, and I made a bid, for the costs and for the execution, and the costs. After that I went into the office to pay for it. I had to wait until they made the papers out, figure what the costs were. I got the papers. I mean the sheriff's certificate of sale, I got it then; I don't know how long it took, took some time. I never informed Mr. McLure that I would hold these properties that I purchased at the sale, for his benefit. I never stated

(Testimony of Rod D. Leggat.)

to him that I would hold them as a mortgage or security for the amount that I bid at the sale. Mr. McLure never did offer me a check for the amount that I had bid at the sale. He did not offer me a check for the amount on the day of the sale. He never at any time after the sale offered me a check for the amount that I bid and eight per cent interest. I never said to him that upon his payment to me of the amount that I bid at the sale and eight per cent interest, that I would convey to him the properties that I bid in at the sale. About a year before the 6th day of June, 1913, I bid in at sheriff's sale on execution some property of Mr. McLure's. Mr. McLure paid the money for the redemption to the sheriff and I received the money from the sheriff. Mr. McLure paid during the period of redemption, the year of redemption. It was the same property and from an attorney in Helena, John B. Clayberg. Mr. McLure first demanded me to turn these properties over to him on the 29th day of March, 1915, in St. Louis. He was [204—146] stopping, he wanted me to call on him, wrote me to call on him at the Jefferson Hotel, and I went up there. It was sometime in the afternoon, I think, in his own room, and he asked me about—said he made a deal. I said, "What for?" "Well," he said, "for the Eastern," and I said, "What right have you to make it; I own that." And that caused a little fuss. I was very sick at the time. There wasn't much of anything done during the fuss, about that, because I told him

(Testimony of Rod D. Leggat.)

*that owned* that. Two or three days later Mr. McLure brought suit against me in St. Louis.

Q. I call your attention to a paper which is marked "Petition. In the St. Louis Circuit, June Term, 1915," and ask you whether or not that is the paper or a copy of the paper that was served on you in that suit. A. Yes, sir.

Mr. MAURY.—We might admit that this is a copy. We will look at it. Not agreeing as to its relevancy—that is doubtless a true copy, and it was served on Mr. Leggat in St. Louis.

Mr. NOLAN.—This paper, if the Court please, is as follows:

Mr. MAURY.—We wish to suggest that there is no plea of another action pending, your Honor. This could not be relevant for that purpose, because there is no plea; and in allowing the evidence to go in we are not admitting there is any such plea or that it is relevant for that kind of a purpose.

The COURT.—I understand.

Mr. NOLAN.—It is offered, your Honor, because it shows another and a different declaration of rights and duties existing between the plaintiff and the defendant. (Reads paper.) I now offer the petition in evidence.

[205—147] The COURT.—Admitted.

(Paper marked Defendant's Exhibit 1).

The WITNESS.—I received five hundred dollars from Mr. McLure on or about August 10th, 1912. I think it was the 9th of August; I asked him if he



(Testimony of Rod D. Leggat.)

would give me a check for five hundred dollars; I was going east to see my sister, who was confined in New York. At that time when I received the check from Mr. McLure, Mr. McLure owed me some money. There was five hundred shares of the Combination that I sent to him to have them placed to my credit, and never was done; cost me \$250. That was about ten years ago. And then there was taxes that I paid, \$70, old taxes, in Silver Bow County, for Mr. McLure. I paid them to Colin Campbell—I had him go over the records; he used to be the abstractor for the Anaconda Company. That was *then* or twelve twelve years ago, and then five or six years ago, I was in St. Louis, and he asked me to get a man to send up the porphyry dyke. It is over near Rimini, on a great deal of property over there; he wanted this man to go up, take a wagon and stay—and he gave me the plats of it at St. Louis, and I brought them up here, large plats, plats of the ground, and that man stayed over there, well, I guess a month, looking all the properties over, and I paid him \$130.00, and sent the bill to Mr. McLure—never got it. That was about eight years ago; and I let his wife have fifty dollars, at the Finlen Hotel. That was the first time after she come from St. Louis, when she was coming back. I don't remember the exact date of that. I can't remember approximately the year. She was a lady and she wanted some money and I gave it to her. That was about four or five years ago, at the Finlen Hotel. And since

(Testimony of Rod D. Leggat.)

then I have been paying Mr. McLure's taxes right along on the [206—148] properties here in this county. The first, Mr. Campbell, he figured what he owed, delinquent and everything of that kind, which I paid, you know, and been doing that ever since; I don't know how much that was. I got some in my pocket that I paid the other day. I have been doing that for twenty-five or thirty years; he never paid any taxes at all in Silver Bow County. I cannot tell how much I have paid on Mr. McLure's account in that time. I should think seventy or eighty dollars. When I got this five hundred dollars from Mr. McLure in August, 1912, I did not ask him for a loan; I asked him for a check. I said, "Charlie, I would like to have you give me a check for \$500." He said, "I will do it." He wrote the check right out. Never anything more said. He gave me the check. Nothing was said as to repayment. Just gave me a check. My wife had just died four or five days, and I had gone east. Mr. McLure never asked for the repayment of the five hundred dollar loan. He never mentioned it. He never demanded the repayment of the five hundred dollars August 10th, 1912.

Cross-examination by Mr. MAURY.

The WITNESS.—I first became acquainted with Mr. McLure in 1867 over in Helena. We first became mining partners in 1888. The first claim we worked as mining partners was the Elvina. That is one of the claims mentioned here. We didn't own

(Testimony of Rod D. Leggat.)

it in partnership, I had taken some bonds on it. I first had taken a bond on it. He didn't give any bond on his, but the other parties that owned it. Until I got the deed for it I didn't own any of it. Mr. McLure put up the money for the work in the Elvina. I don't know how much he put up, possibly forty or fifty thousand dollars. We were to be half partners in it. I superintended it. When the monthly bills [207—149] would come due I would draw on Mr. McLure. He was sometimes dilatory but always came through with a check. Sometimes he didn't answer my letters at all, but eventually the checks always got here. I don't know; I couldn't state as to whether it was forty or fifty thousand dollars or eighty-five or ninety; it might have been a little more. I think I paid for the Elvina at the rate of twelve thousand five hundred per quarter; that each quarter cost twelve thousand five hundred. I think that is right. Mr. McLure put up that twelve thousand five hundred. He put up all of that money, fifty thousand dollars. And then after that we sank a shaft 250 feet deep. I think I worked it two or three years. I don't know if the bills were as high as twenty-five hundred dollars a month; yes, they might have been sometimes, some of them, yes. Counting the bonds taken in, I would say that the amount of money put up on the Elvina transaction by Mr. McLure, was close to ninety thousand dollars. That is the cash price. I think we stopped work or decided to quit entirely working the Elvina

(Testimony of Rod D. Leggat.)

about 1893 when silver went down. It is not a fact that Mr. McLure had put up all the money and I had merely superintended it. I put up something myself. I can't tell how much. There was never anything said that we would just call that a half and split the claim; nothing said about me having a half interest and therefore that that wouldn't go through the accounts. Never anything of the kind said. I thought I was the owner of a half interest in the Elvina.

Q. And you thought so on the 17th day of July, 1912; that was the year before the sale; you thought that you were an owner of a half interest in the Elvina, didn't you?

[208—150] A. That is an option that I gave to parties, and put my name in it, and Mr. McLure got it, he held it two days before he signed it.

I wanted to get my deed, you know, and I put it in there. He signed it, too. He signed the option with me, but he kept it, kept the thing two days. This paper that you show me, marked Plaintiff's Exhibit 20, that is an option that Mr. McLure and I went into on the 17th day of July, 1912. We agreed to sell to Ernest Anderson and Andrew Slatindale. We agreed to sell the Elvina for \$100,000. And we gave them a lease on it. I don't know when Mr. McLure signed it; he kept the lease two days before he signed it. This is my signature and that is Mr. McLure's signature. Mine was signed first. At that time the record title of the Elvina stood in



(Testimony of Rod D. Leggat.)

the name of Charles D. McLure. There wasn't a scratch of a pen to show that I owned a half interest in it. But after I signed the lease, he signed it; after I signed it, Mr. McLure signed it. He and I were a week or two agreeing with Slattendale and Anderson on the terms of the lease and what the lessees had to do, and how much work they had to carry on. Mr. McLure and I were consulting together with them during that time. After we quit on the Elvina I never paid Mr. McLure any portion of the ninety thousand dollars, or say forty thousand, whatever it was, that he put up, as the working expenses. I didn't owe it to him; he was to furnish everything for all the expense on that mine. And I was to do the superintending.

Q. Now, at one time all of the Elvina title had stood in your name, hadn't it?

A. Well, I took a bond on some of them, and didn't get his. I took a bond on Mr. Clark's and Mr. Argyle's, but I did not get Mr. McLure's. He promised to give it and then he considered he would join in with me in working the ground. [209—151] He and I worked it as partners for some years. Mr. McLure and I next went into partnership in mining after we decided to shut the Elvina down, over at Sand Creek. That was on the McVey claim and others. I can't think of the names; there were several of them. The Chili was one. I don't know how much money Mr. McLure put up there. I wouldn't say, it was around about forty thousand dollars.

(Testimony of Rod D. Leggat.)

We went 160 feet deep. We did not encounter much water, no water at all to amount to anything. There was a bonus paid. I think it was a thousand dollars. And then we went 160 feet deep. We did not drive any tunnels or any crosscuts. We just sunk on the vein and quit in the sump. We didn't drift either way; never drifted a foot. I don't know how long we were sinking that 160 feet. I don't know how much of the money I put up there; I had the whole country taken up with options; taken up a whole lot of it. And I used to pay things myself. I haven't an estimate of how much I paid; it has passed away; I really have forgotten. That venture proved unsuccessful. Mr. McLure and I never had any accounting between us. There had been no accounting between us up to August 10th, 1912. I don't know how long I have been paying his taxes. Colin Campbell told me that there was lots of redemptions or something on the property—had been sold; he figured it out and I paid that. Seventy dollars. But ever since then I have been paying them myself; got deeds right here, some of them, this year. When I paid that \$70 I was a co-owner with Mr. McLure in the Eastern. I was not a co-owner in the Elvina, I didn't have the title to it. I don't know whether I was entitled to have the title to it; I didn't have it. I think one-half of it rightfully belonged to me. I don't know whether it rightfully belonged to me up until the time I bought at sheriff's sale; I would have to go to law to get it. Mr. Mc-

(Testimony of Rod D. Leggat.)

Lure had not promised [210—152] it to me. Yes, he promised it, and he never gave a deed for it. He had promised it to me, though.

Q. Did you honestly believe you owned one-half interest in that on the day of the sale?

A. Well, I don't know. On the day of the sale I bid it in to protect myself on the Elvina claim. Of course I was afraid my one-half interest would get into the hands of somebody else. I don't know anything about Jim Murray. I did not see James A. Murray just before the sale, not that I remember. I don't know if I saw him any time shortly—within two or three days before the same. I might have done so. There were five hundred shares of this Combination stock. I gave that or sent that to Mr. McLure ten years ago, I think. I wanted him to place it to my credit; make out—for me; I have got 250 shares now, and I wanted some more of it and I bought it. I don't know what became of that 500 shares that I sent to Mr. McLure. It is selling for fifty cents. That is what I paid for it. I paid fifty cents a share for it. I cannot give you an approximate date of when I sent that to Mr. McLure. I think his secretary could tell, the secretary of the company. He took it and put it in his own name. I never wrote Mr. McLure a letter about that. I don't think he ever sold that; he was buying the property. I don't think he sold it; he took it in his own name; that is what he done. I loaned Mrs. McLure, or handed her as an accommodation one day, fifty dollars. I think it was the first time that she

(Testimony of Rod D. Leggat.)

went to St. Louis after she come here first, you know; I don't know. I don't know how long ago that was, three or four—four years ago; I think it was about four years ago. She knows it. Mrs. McLure was all right then. Of course I also knew that whatever money might go to Mrs. McLure, why Mr. McLure would [211—153] always say, that was all right, he was responsible for it. I think that he was. That is fifty dollars, the taxes were seventy or eighty dollars. And also the work of Mr. Masters goes to make that five hundred dollars. Mr. Masters that I sent over to the porphyry dyke to look after Mr. McLure's mines, water right. That was about six or eight years ago. I think I paid him \$120.00. That man is alive, he is down in Idaho. Mr. McLure and I never went mining over to the Cardwell district together; never a dollar; absolutely he never had put in there, and didn't own anything there. He brought that in his suit in St. Louis; he never owned a dollar; never was interested in the camp. He never put up any money on that. And I never wrote him any letters about that. I have not read the various letters of mine that have been on file here, since last June, when this trial commenced. I have not glanced over them or looked through them in any way. Mr. McLure and I were intimate; I think there was a great friendship between us. No, he was not my dearest friend. I don't think it was thirty years that I took care of his property here, since '78, '79, until two years ago. In a measure I



(Testimony of Rod D. Leggat.)

acted as agent to sell the property, but always wired to him, anything of the kind. I gave leases on it, one lease was made. I think you read it there; I don't remember now when it was. I don't think I made one lease when Mr. McLure was not here. I did not lease the entire Eastern claim, a verbal lease. That was first, years ago, I don't remember when it was, John Noyes and me; John Noyes owned in it at that time. I fixed the price that was to be paid by Wolvin & Hayes. Mr. McLure was in St. Louis. I telephoned about it; told him what was done. I telephoned him what I had done, for two hundred thousand dollars. I don't remember whether he was at Phillipsburg or not; but [212—154] he came right on; come right on. I signed the contract agreeing to deliver. Capt. Sanders didn't have anything to do with it. It was Mr. Wolvin and Hayes. The only time I knew Mr. Sanders was when he wanted to pay twenty thousand dollars, and telephoned to my wife, or my house, that he wanted to pay the twenty thousand dollars into the bank and I telephoned to him that I couldn't go, and I never went with Mr. Sanders to the bank; Mr. Sanders come to my house.

Q. Now, on exhibit "A," on the first day of July, 1912, you and Captain Sanders signed up this, didn't you (hands paper to witness).

A. No. Oh, yes, the first; yes. That was preliminary. No, that was on the 10th of July, or the 20th of July—of June. This is when it was paid. When

(Testimony of Rod D. Leggat.)

I signed my name there I was acting for all of the owners of the Eastern Lode claim, and acting as their steward or confidential agent, and fixed the price.

(Recess until two o'clock P. M. same day.)

**[Testimony of Thomas Fenlon, for Plaintiff.]**

[213—155] THOMAS FENLON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. MAURY.

The WITNESS.—I was not cashier of the Miners Savings Bank & Trust Company of Butte on July 6th, 1913. I have a page of the book of original entries showing the account of Charles D. McLure with that bank on that date. I am cashier now.

Q. Can you tell us the status of the account of Charles D. McLure on that date?

A. July 6th, 1913?

Q. July 6th, 1913.

Mr. DONOVAN.—We object to this on the ground the paper should be identified as correct.

The COURT.—What date, now, what is this, the date of the sale. It was spoken of heretofore as June 6th.

Mr. MAURY.—That is true.

Mr. DONOVAN.—June 6th is the date of the execution sale.

Q. Have you June 6th? A. Yes, sir.

Q. What was the credit, if any, to the account of Charles D. McLure, subject to check?

(Testimony of Thomas Fenlon.)

Mr. DONOVAN.—We renew the objection upon the ground that the witness has stated he was not an employee of the bank at that time.

The WITNESS.—No, I wasn't cashier then.

Q. What office did you hold?

A. Why, I was teller.

The COURT.—Well, as long as he knows; the objection is overruled.

[214—156] A. (The WITNESS.)—On June 6th the balance was \$1,035.56. Before that May 8th was the last time the change—it was \$1060.50 then. It next changed after June 6th, 1913, on July 8th. That was subject to check. It was open account subject to check of Charles D. McLure.

Cross-examination by Mr. NOLAN.

The WITNESS.—The account was closed in September, 1914. In May and June of 1914, he had a much smaller balance at that time; I didn't bring the sheet for that time; this just goes up to a much earlier date than that.

(Witness excused.)

**[Testimony of Rod D. Leggat, for Defendant  
(Recalled).]**

ROD D. LEGGAT, recalled to the stand for further cross-examination.

(By Mr. MAURY.)

The WITNESS.—This letter which you show me which bears date October 24th, 1907, is to Mr. McLure. I recognize my own handwriting. This is my signature.

Mr. MAURY.—The letter has already been intro-

(Testimony of Rod D. Leggat.)

duced, though never read to the Court. It reads (reads letter).

The WITNESS.—This letter, August 24th, 1909, was sent by me to Mr. McLure at St. Louis. It starts out "My dear old true friend" and reads partly "My sympathy is always with the under dog in the fight. Can't held it. It is born in me." That was part of the letter. In this letter you say: "One thing I want distinctly understood. If there is any stock or interest [215—157] transferred to my name, I will on demand from you transfer it at once back to you. So just keep this." That was sent May 25th, 1907, the date the letter bears, or about then. My relations with McLure were exceedingly intimate when you sent those letters. That intimate relation ceased—I don't know—two or three years before March 29th, 1915. We were friendly and everything of the kind, but he had kept things from you, you know; didn't tell me lots of things, pertaining to his own family and his own self, or his own interests. Never told me anything about the porphyry dyke. But down at—well, near Great Falls there. Neihart. I was made president of that and I never knew a thing of it. Asked him to tell me something and he didn't tell me. He made me president of it. That was the Diamond R. I was only what he had made me in the Diamond R. I don't know how much of a stockholder, fifty shares, something of that kind, just to qualify me as president and director. I can't remember the time I was made president of the Dia-



(Testimony of Rod D. Leggat.)

mond R. by Mr. McLure. I went over to Great Falls at my own expense.

(Witness excused.)

Mr. NOLAN.—The defendant rests.

The COURT.—Anything further from the plaintiff.

Mr. MAURY.—The plaintiff rests, your Honor.

**[Order Approving, etc., Statement of Evidence.]**

**[216] CERTIFICATE.**

I, George M. Bourquin, Judge of the above-entitled court, do hereby certify that the foregoing statement is true, complete and properly prepared, and the same is hereby approved and ordered filed as a part of the record for the purpose of the appeal herein.

Dated this 6th day of March, 1916.

BOURQUIN,

District Judge.

Filed Mar. 6, 1916. Geo. W. Sproule, Clerk.

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**[Certificate of Clerk, U. S. District Court to  
Transcript of Record.]**

**[217]** United States of America,  
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume of 216 pages, numbered consecutively from 1 to 216, inclusive, is a full,

true and correct transcript of the pleadings, decree and all other records and files in said cause mentioned in the praecipe for transcript herein, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Ninety no/100 Dollars (\$90.00), and have been paid by the appellant.

Witness my hand and the seal of said court this 11th day of March, A. D. 1916.

[Seal]

GEO. W. SPROULE,

Clerk.

[Ten Cent Internal Revenue Stamp. Canceled.  
3/11/16. G. W. S.]

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[Endorsed]: No. 2761. United States Circuit Court of Appeals for the Ninth Circuit. Rod D. Leggat, Appellant, vs. Charles D. McLure, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed March 15, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

*In the United States District Court for the District  
of Montana.*

CHARLES D. McLURE,

Plaintiff,

vs.

ROD D. LEGGAT,

Defendant.

**Order Extending Time to Docket Case.**

Good cause appearing, the defendant and appellant above named is given up to and including the 25th day of March, 1916, within which to file the record on appeal and docket the case with the clerk of the United States Court of Appeals for the Ninth Circuit.

Dated at Great Falls, Montana, this 6th day of March, 1916.

BOURQUIN,

Judge.

[Endorsed]: No. 2761. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to March 25, 1916, to File Record Thereof and to Docket Case. Filed Mar. 9, 1916. F. D. Monckton, Clerk. Refiled Mar. 15, 1916. F. D. Monckton, Clerk.





**United States Circuit Court of Appeals**  
**For the Ninth Circuit.**

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**ROD D. LEGGAT,**

**Appellant,**

**vs.**

**CHARLES D. McLURE,**

**Appellee.**

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**BRIEF OF APPELLANT.**

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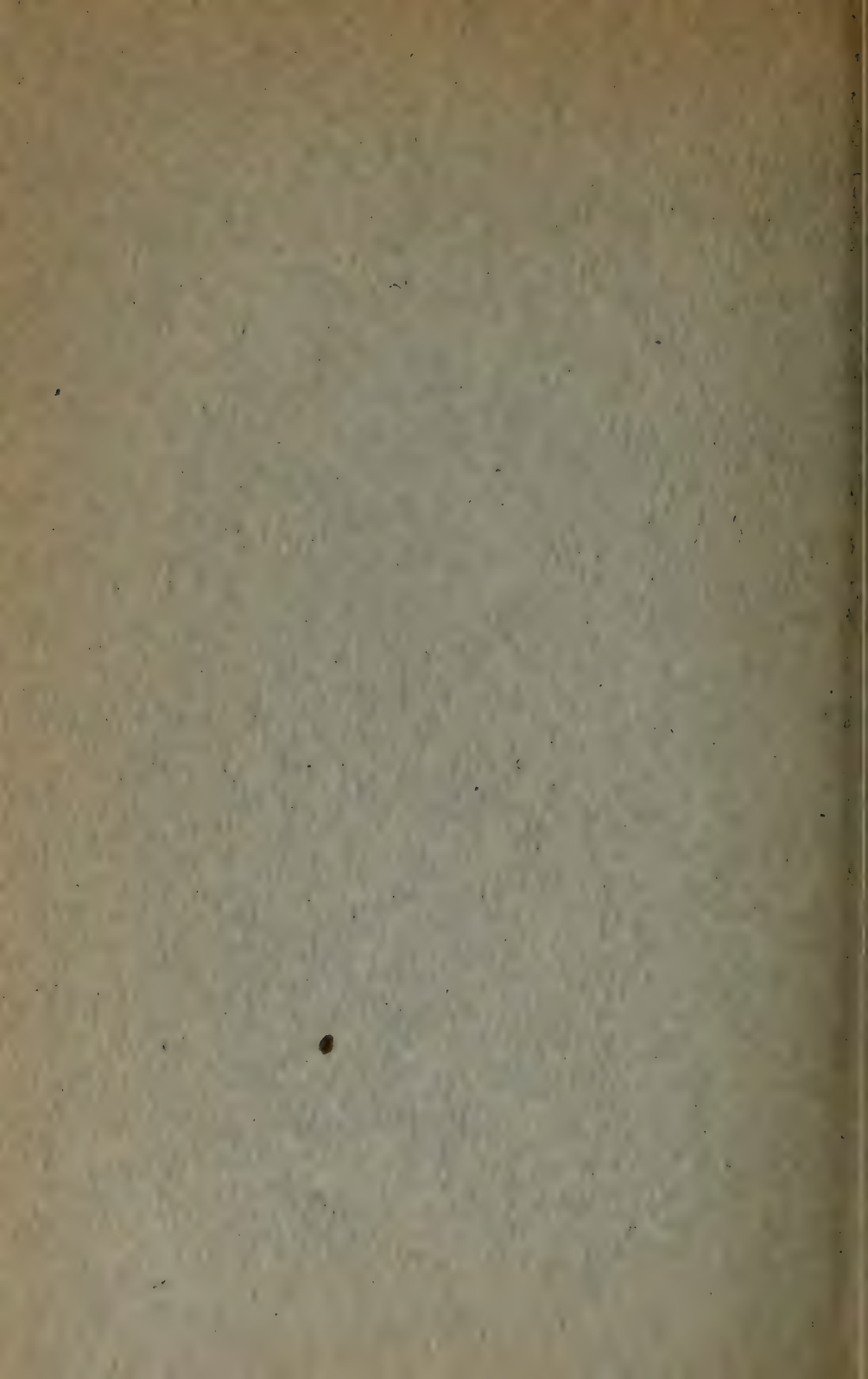
**NOLAN & DONOVAN,**

*Solicitors for Appellant.*

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**United States Circuit Court of Appeals**  
**For the Ninth Circuit.**

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ROD D. LEGGAT,

Appellant,

vs.

CHARLES D. McLURE,

Appellee.

NO. 2761.

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BRIEF OF APPELLANT.

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NOLAN & DONOVAN,

Solicitors for Appellant.

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STATEMENT OF THE CASE.

This action was brought on the equity side of the District Court of Montana, on April 7, 1915, by appellee against appellant, to compel the conveyance of real property to appellee, which property was purchased at execution sale by appellant. The gist of the bill is stated in paragraph eight (T. 4-6.) Mining properties of the appellee, worth approximately one hundred thousand dollars, were offered for sale under an execution at Butte, Silver Bow County, Montana, on June 6, 1913, upon a

judgment in favor of Wight & Pew against appellee, where they were bid in by appellant for \$1004.15. On that date appellee alleges that the appellant agreed to bid an amount equal to the judgment, principal and costs, and to hold the property as a mortgage; and that he further agreed, before the period of redemption had expired, namely one year, that he "would hold any title" that he might obtain as a mortgage. Appellee sought to redeem upon payment of the amount bid at the execution sale, less a loan of five hundred dollars made by appellee to appellant. All the material allegations of the bill were denied by the answer (t. 14) and supplemental answer (t. 23). The district court found for the appellee and directed that upon payment of the sum bid, the appellant should convey all of the property belonging to the appellee on the date of the execution sale. From this decree the appeal has been taken.

The principal question arising in the case is: If the title acquired by Leggat on June 6, 1913, was, at the time he acquired it, the title of an ordinary purchaser at execution sale not affected by any trust, did Leggat become a trustee and a mere mortgagee because of his conduct during the period of redemption, which induced McLure to believe that he might affect a redemption after the period of redemption had expired? Did appellee sustain the burden of proof imposed on him in seeking to establish the trust alleged?

ASSIGNMENT OF ERRORS RELIED ON BY  
APPELLANT. (T. 31, 32, 33.)

7. The court erred in finding that the defendant agreed with the complainant that he would bid an amount equal to the judgment as to principal, interest and accruing costs and



expenses of sale when the sheriff should offer the said real property above described for sale under the execution issued in Wight et al. vs. complainant.

10. The court erred in finding that the defendant informed complainant repeatedly that after the period of one year from the date of the said execution sale might expire, provided there was no redemption, defendant would hold any title that might be obtained by reason of the expiration of time merely as a mortgage to secure the repayment from the complainant of the sum bid at the execution sale by defendant and interest thereon at the rate of eight per cent per annum.

13. The Court erred in finding that, had complainant sought bidders, complainant's interest in any one of the four parcels of land described in plaintiff's bill of complaint would have brought the amount of the said judgment of Ira T. Wight et al. versus complainant.

15. The Court erred in concluding that the plaintiff was entitled to recover of and from the defendant the interest in the mining claims set out in the complaint and claimed by him.

18. The Court erred in concluding that where the purchaser at sheriff's sale leads the judgment debtor to believe he can redeem after the statutory time runs and thus causes him to fail to redeem before the statute runs, the purchaser waives the time and the debtor can redeem within a reasonable time after the statute runs.

#### BRIEF OF ARGUMENT.

The rule relating to the burden of proof, as well as the weight and sufficiency of evidence, is the same in actions to

establish a trust as in other civil cases. The burden rests upon the party seeking to establish and enforce a trust to show clearly all the facts upon which his cause of action is founded, and the evidence must be clear, full and satisfactory, and of such a character as to disclose the exact rights and relations of the parties and take the matter out of the realm of conjecture or presumption; and where the evidence is capable of reasonable explanation on a theory other than the existence of a trust, no trust will be held established.

13 En. Ev. 160.

39 Cyc. 84.

16 Cyc. 926, 932.

“But it is plain that the principle which turns a cotenant into a trustee who buys for himself a hostile outstanding title can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public.”

Starkweather vs. Jenner, 210 U. S. 524, 17 A. & E.  
Anno. Cas. 1167.

Of course the burden of proof would immediately shift if it were shown that the defendant occupied towards the plaintiff a relation that forbade him to acquire the property of the plaintiff. If, for instance, the money that he paid the sheriff was the money of the plaintiff, or if he were the agent of plaintiff, or his guardian, or attorney. The result of all the cases where a trust is presumed is this: That where it is shown that a person has without right the property of another, the

law presumes that it was received for the latter and is held for his use.

If the appellee has any right against appellant it arose on June 6, 1913.

The allegations in the bill, paragraph 8 (not sustained), that McLure requested Leggat to become a purchaser because he was without funds, and that he attended the sale with the defendant, are explained in a reasonable fashion, but it seems to us that his case, both in allegation and in proof, is not so clear, convincing and satisfactory as to remove his claim from the realm of conjecture and doubt. A few days before in St. Louis, he alleges a state of facts (t. 186, 187) not to be reconciled with the present bill. Some of these inconsistencies, such as the request for an accounting, have been explained, appellee setting forth that Leggat had told him that he had sold the properties, but no explanation has been offered concerning the origin of his right of action against the appellee as set forth in the St. Louis action. He sets up that the sale to Wolvin & Hayes of the Bland, Ouichita and Eastern claims, was carried on by Leggat, and that thereafter the sale was abandoned by the prospective purchasers. He then avers:

“Plaintiff further states that at the request of the said defendant, and in furtherance of resummation of said negotiations then being conducted by plaintiff and defendant for the sale of said mining properties and the interest of the parties hereto, respectively, the full title to the interest of this plaintiff in and to said properties was placed in the name of said defendant, so that upon completion of negotiations for the sale thereof the title thereto might be quickly and effectively passed to the prospective purchasers thereof, with whom said defendant and this plaintiff were negotiating for the sale of the same.

"Plaintiff further states that at the time of placing the title to the interest of this plaintiff in the name of said defendant as aforesaid, this plaintiff had full confidence in the integrity of the said defendant and in his assurances and promises that the interest of this plaintiff in said property would be held by the defendant for the plaintiff and fully accounted for to the plaintiff on any sale thereof by the defendant, if and when this plaintiff requested sale and disposition" and so forth.

The present case, both in allegation and proof, refutes most emphatically that McLure placed the title to the properties in Leggat "at the request of the said defendant and in furtherance of resumption of ..... negotiations ..... for the sale .....". Here he alleges that he sent Leggat to the sale to purchase the property for him and to hold it as a mortgage for the security of the amount bid at the sale, to be held by the defendant "as security" for the payment of the said sum of \$1004.15 with interest at the legal rate from June 8, 1913, until such time as he desired to take up the loan. There is nothing about a resumption of negotiations for a sale of the properties, nothing about an agreement to convey to such person as he might designate upon a sale.

Again, the bill alleges, paragraph 8, "that the defendant informed your orator repeatedly that after the period of one year might expire, provided there was no redemption, he would hold any title that might be obtained by reason of the expiration of time merely as a mortgage" and so forth. No explanation was offered upon the hearing as to these inconsistencies.

It appears from his own testimony that he went to the office of the sheriff about half past seven or eight o'clock in the morning with the object of saving the expense of a sheriff's sale (t. 147, 148).



"Q. When the properties involved in the complaint . . . were advertised for sale, what did you do on the morning of the sale?

"A. On the morning of the sale, I think the sale was at about nine o'clock; I got up early in the morning and got my breakfast and went up to the sheriff's office, and I got there about eight o'clock, or I believe half an hour or a quarter of an hour before eight o'clock, and the deputy or clerk was there, and I asked them if I could come and pay off the judgment and stop the sale—in other words I wanted to save any expense of sheriff's sale, and he replied to me that the property had been advertised for sale and would have to be sold, and I asked him then what time it would be sold and he said at ten o'clock. I then asked him if he would take my check if I would bid on the property, and he said that it would have to be a certified check. 'Well,' I says, 'you can telephone to the bank and see whether the check is good,' and he replied then, he says, 'Mr. Wight will be here at the sale and if he will take your check it will be all right,' and my reply was that Mr. Wight had sued me and I would not ask him to take my check; so I came up and went to the hotel, which was at least a few minutes before nine o'clock, and I telephoned to Mr. Leggat and told him what had past, and as Mr. Leggat was an owner in the Eastern claim, which was in my name, or rather I held it, and I told him they had refused my check and I says 'Come over,' and he says, 'All right, I will be right over' and he came over . . ."

Is it not a reasonable inference that these circumstances would have been so clearly and indelibly fixed upon the memory of Mr. McLure on April 5, 1915, when he filed his bill in St. Louis, that he would not have alleged that he voluntarily

place the title to his properties in the name of Mr. Leggat in anticipation of a resumption of negotiations for their sale? Is not the testimony quoted above so wholly inconsistent with his St. Louis complaint that there is no common ground between them?

The alleged agreement upon which he now stands is contained in the continuation of the last answer and is as follows (t. 148):

"And I was sitting in the hotel waiting for him to come and I saw him coming across the street and before he had crossed the street I went over and stopped him and I says Mr. Leggat, the sale is to be at ten o'clock, and I says they refused by check, and he says, they will take my check, and I says, will you come up and bid it in, and he says, yes, and I says, I will give you a check when we come down, and he says, all right, I will go up and attend to it, and he went up to the sale, and I suppose it was about a quarter after ten, or half past ten, anyway between ten and eleven o'clock, and he came down to the hotel and he told me that he had bid the property in, and he said that Mr. Murray was there, I think he said James A. Murray, but I am not sure, but I know he said Murray was there, and he said some of the Hennessy's and they were going to bid the property in, and he went in and told them that it was our joint property, and said that by his own influence he had persuaded them not to bid against him, so he told them their account would be all right and that he would bid it in, and he did bid it in, and I says, Rod, if you want a check for this I will give you my check for it, and he says never mind that."

Is it likely that Mr. McLure, when he filed his bill in St. Louis, he having acquired no different information in the mean-

time concerning the transaction at the sale, having been told that Mr. Leggat had even gone to the extent of informing other creditors of Mr. McLure that they would receive their account if they permitted Mr. Leggat to bid it in, having permitted Mr. Leggat to pay for the property, and having allowed Mr. Leggat to decline reimbursement—is it likely that he would have interpreted these transactions as establishing the relation between himself and Leggat that he alleges in the St. Louis bill?

Messrs. Lynch and Noonan, the two clerks and deputy sheriffs who testified, have no interest in the transaction (t. 199, 204). They have no recollection of seeing Mr. McLure on the day of the sale. Mr. Lynch conducted the sale and remembers very clearly the sale itself (t. 199, 204). We submit that under the rule imposed upon him in this case that it was his duty to have produced the person to whom he made the application to be permitted to pay the judgment, and we have a right to presume that his failure to produce such person and testimony, independent of his own recollection of the matter, is because he has found upon reflection that as to this point he is mistaken.

Neither can it be urged here that the transaction upon which he seeks to recover here is consistent with the St. Louis bill. He is quite positive here about the transactions on June 6, 1913, but very uncertain concerning any portion of the evidence that even remotely tends to uphold the interpretation of his rights as set forth in the St. Louis bill.

The testimony of Mr. Murray and of Captain Sanders is not inconsistent with the position of the appellant. It is true that Mr. Leggat had handled the sale of the Eastern claim for T. Stewart White and the appellee. It is undisputed, however,

that all preliminary negotiations concerning the price and terms were submitted to Mr. McLure before their final adoption evidenced by a formal agreement. So far as the testimony shows any agency, it is not proof of an agency such as the law attaches a trust to as to a judicial sale, because here defendant was acting in carrying on the preliminary negotiations not with reference to the judicial sale. During the period of one year after June 6, 1913, Mr. McLure had the right to repurchase. Mr. Murray testifies as to a conversation that occurred during this period, or during the period covering one year after the sale. It also appears from the testimony that in 1912 Mr. Leggat had purchased the same property on execution sale in the suit of John Clayberg against appellee, and that the appellee had redeemed by a direct payment to the sheriff without consulting or notifying Mr. Leggat (t. 209).

There is no conflict here as to the relation that was established between the parties in the Elvina. Their agreement was that McLure should put up his money for the purchase and development, against the appellant's time and labor in procuring the property and supervising its development. Whatever relation appellee seeks to establish by operation of law has no application in the face of this agreement. The weight of authority is entirely contrary to the proposition that one tenant in common, who buys the common property at a judicial sale, purchases for the benefit of all tenants in common. This is only true in a limited sense. That is where the purchasing tenant in common purchases an obligation against the common property on which he is personally or jointly liable, as for instance the purchase of a tax title would be held to inure in the hands of a cotenant to the benefit of his cotenants.



The rule as stated in 7 R. C. L., page 860, is as follows:

"On the sale of the common property for the satisfaction of a debt to pay which rests upon one tenant in common alone, his cotenant may purchase the interest in the same manner as a stranger might do so. But it is also true that where a cotenant acquires title from a sale under a deed of trust made by all the cotenants, for a debt binding all, and the sale is caused by his failure to pay his share of the debt, he cannot, under his rights so derived, hold the land against his cotenants. It is obvious that if a cotenant causes the common property to be sold under a deed of trust or a mortgage or other lien, for the purpose of purchasing, for his own benefit, the outstanding title thus created, he is guilty of a breach of trust which precludes him from taking advantage of such title as against the other cotenants. Likewise, one tenant in common, in the sole or joint possession of lands, cannot acquire a tax title issued for taxes accruing during his possession, and assert it to cut off his cotenants, whether the cotenancy exists under the same or different instruments. Since it is his duty to pay the taxes, he cannot take advantage of his own dereliction or neglect."

*Starkweather vs. Jenner et al.*, *supra*.

He may purchase the common property at a judicial sale or sale under power.

*Starkweather vs. Jenner et al.*, *supra*.

See note to this case, 17 A. & E. Anno. Cas. pp. 1169 and 1172, where it is stated that

"The rule appears to be well settled that one tenant in common may purchase the interest of his cotenant upon a sale for the satisfaction of a debt, the duty to pay which rests upon

such tenant alone, in the same manner that a stranger might do so."

Britton vs. Handy, 20 Ark. 381, 73 Am. Dec. 497.

Gunther vs. Latham, 7 Cal. 588.

Apart from the decisions cited, the appellee is not in a position to urge, under his view of the case, that any trust has been established by appellant's purchase of the Elvina. There was no secrecy about the sale. Plaintiff says he knew of it, and under his view it was done under his direction.

Gross inadequacy of price alone unaccompanied by fraud cannot be held to avoid a judicial sale.

A sale will not be set aside because of the gross inadequacy of the sum paid to the value of the property.

Burton vs. Kipp, 30 Mont. 275; 76 Pac. 563.

"A gross inadequacy of price is competent, so far as it goes, to establish fraud; but it is not in itself, in the absence of other circumstances tending to show fraudulent behavior on the part of the sheriff or the plaintiff in the writ, enough to warrant the presumption that the sale was fraudulent."

Again the appellee is not in a position to urge this point because it affirmatively appears that he knew that the property was purchased for the amount of the judgment, interest and costs, and under his view of this case, it was purchased for \$1100 under his direction. He should not be heard to assert anything to the contrary at this late date.

As to the construction of the statute as to the manner of conducting sales of property on execution, the question is disposed of in Burton vs. Kipp, *supra*, where sales en masse

are upheld. The provision of the Montana statute is that in "sales of real property consisting of several known lots or parcels, they must be sold separately."

Sec. 6830, Revised Codes, 1907.

The judgment debtor has the right to be present and direct the order in which the parcels shall be sold. The certificate of sale here shows that the lots or parcels were offered separately, and that there were no bidders for them. This fact does not appear in *Burton vs. Kipp*.

"So far as the pleadings show the property may actually have been offered in different lots and sold in gross only after it was found that there were no bidders for the different parcels. In such case the sale may be in gross for the creditor is not to be foreclosed of his effort to collect his debt by the mere want of bidders for the different parcels. Here again the provision for redemption affords protection for the debtor, and in the absence of a specific allegation of circumstances tending to show that plaintiff was prevented from availing herself of this protection, she should not be heard to complain."

Here the appellee is not in a position to complain because he had an opportunity to direct the manner of sale by the sheriff and has known, or should have known, since June 6, 1913, that his property was sold in gross.

IF THE TITLE ACQUIRED BY LEGGAT ON JUNE 6, 1913, WAS, AT THE TIME HE ACQUIRED IT, THE TITLE OF AN ORDINARY PURCHASER AT EXECUTION SALE, NOT AFFECTED BY ANY TRUST, PLAINTIFF'S EVIDENCE OF STATEMENTS MADE BY DEFENDANT DURING THE PERIOD OF RE-

DEMPTION IS, EVEN IF TRUE, ENTIRELY INSUFFICIENT TO CREATE A TRUST IN THE PROPERTY IN QUESTION OR TO REDUCE THE DEFENDANT'S INTEREST TO THAT OF A MERE MORTGAGEE.—

Authorities can be found which sustain the position that if by the representations, conduct and promises of the purchaser at the execution sale, during the period of redemption, the judgment debtor is lulled into a false security and thereby permits the period of redemption to elapse, the purchaser will be declared to be a trustee.

20 Cyc. 232.

These authorities, however, have no application to the case at bar, because they rest upon the proposition that a purchaser at execution sale does not at such sale and before the period of redemption expires, acquire the full title of the judgment debtor, but acquires only an equitable estate (17 Cyc. 1200), or simply an inchoate or conditional right to an estate liable to be defeated any time within one year by the payment of the purchase money and interest.

Curtis vs. Millard and Co. 14 Iowa 128, 81 Am. Dec. 460.

And, therefore, if by his fraud, the purchaser induces the judgment debtor to permit the period of redemption to elapse and thereby procures the full legal title to the estate, he has gained a thing by fraud and is, upon well settled principles of equity as well as by express provisions of the statutes of this state, an involuntary trustee of the thing so gained.

Section 5373, Revised Codes of Montana: "One who gains a thing by fraud . . . undue influence, the violation of a trust, or other wrongful act, is, unless he has some other



or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

39 Cyc. 172.

Pomeroy Eq. Juris. Sec. 1044.

But under the law of Montana, the defendant herein acquired, by virtue of his purchase at the execution sale, on June 6, 1913, the full legal and equitable title of McLure to the real estate in question.

Section 6836, Revised Codes of Montana: "Upon a sale of real property, the purchaser is substituted to and acquires the right, title and interest, and claim of the judgment debtor thereto . . . ."

McQueeney vs. Toomey, 36 Mont. 282; 92 Pac. 561.

McLure retained only a bare right to repurchase.

McQueeney vs. Toomey, *supra*.

And this right was not real estate nor an interest in real estate.

McQueeney vs. Toomey, *supra*.

Nothing, therefore, passed to Leggat by reason of the expiration of the period of redemption or the issuance of the sheriff's deed; and, if during the period of redemption, he made the promise testified to by the plaintiff herein, since he acquired no *property* by reason thereof, there is nothing to which any trust can attach. The sheriff's deed issued to Leggat on the 11th day of June, 1914, performed no function other than to certify that there had been no redemption. It did not transfer any title because the title had passed on June 6, 1913.

McQueeney vs. Toomey, *supra*.

The title so acquired by Leggat could have been revested in McLure by a redemption within one year.

Section 6838, Revised Codes of Montana: "The judgment debtor . . . may redeem the property from the purchaser any time within one year after the same . . . ."

But, aside from the methods of redemption prescribed by the statute, it could not be transferred or impaired otherwise than by an instrument in writing.

Section 4612, Revised Codes of Montana: "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same, or by his agent thereunto authorized by writing."

Section 5091, Revised Codes of Montana: "No agreement for the sale of real property, or of any interest therein, is valid unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged . . . ."

Section 7969, Revised Codes of Montana: "In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged . . . ; evidence, therefore, of the agreement, cannot be received within the writing or secondary evidence of its contents:

. . . . .

"5. An agreement for the . . . . sale of real property, or of an interest therein . . . ."

A bare oral promise by Leggat to convey to McLure the real

estate, the full, legal and equitable title of which was then vested in him, falls plainly within the statute of frauds and is void.

Secs. 5091 and 7969, Revised Codes of Montana.

Nor can the interest of Leggat in the properties so acquired be reduced to that of a mere mortgagee by evidence of oral promises, because this would involve a transfer of the *title* back to McLure, since a mortgagee does not hold the *title* to the property mortgaged.

Swain vs. McMillan, 30 Mont. 439; 76 Pac. 945.

And a transfer of real estate cannot be accomplished by parole.

See sections above cited.

We therefore respectfully submit that the evidence given by the plaintiff of promises and representations and conduct on the part of Leggat, between June 6, 1913, and June 6, 1914, even if they were all found to be true, would not raise a trust in favor of McLure nor reduce the interest of Leggat in the property to that of a mere mortgagee.

Respectfully submitted,

NOLAN & DONOVAN,

Solicitors for Defendant.





IN THE  
CIRCUIT COURT OF APPEALS  
FOR THE  
NINTH CIRCUIT.

---

ROD D. LEGGAT,  
*Appellant,*

vs.

CHARLES D. McCLURE,  
*Appellee.*

---

**BRIEF OF APPELLEE.**

---

Appearances:

GUNN, RASCH & HALL,

MAURY, TEMPLEMAN & DAVIES,  
*Solicitors for Appellee.*



No. 2761.

IN THE  
**United States Circuit Court of Appeals**  
FOR THE  
**NINTH CIRCUIT.**

---

ROD D. LEGGAT,  
*Appellant,*

vs.

CHARLES D. McCLURE,  
*Appellee.*

---

**BRIEF OF APPELLEE.**

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ADDITIONAL STATEMENT OF THE CASE.

We do not feel that the statement of the case made by the appellant is sufficiently full to correctly present the cause to the court.

Quoting from the bill of complaint, such matters as were found to be true by the lower court we add as a portion of our statement.

McLure was a citizen of Missouri, Leggat a citizen of Montana. The amount involved, exclusive of interest and costs is more than \$3,000.00, to-wit: it is more than the sum of \$148,000.00; that on April 18, 1913, McLure was seised in fee simple absolute of a three-quarters interest in the Eastern, three-eighths interest in the Ouichita; one-half interest in the Elvina, and one-sixth interest in the Bland quartz lode mining claims in Silver Bow County, Montana.

Paraphrasing the complaint:

That on April 18, 1913, a judgment was rendered against McLure by Wight and others for \$964.65. Execution was issued on May 14, 1913, for such sum. The sheriff of Silver Bow County, wherein the property lay, levied upon and seized McLure's four separate and distinct parcels of land under the said execution, and advertised them for sale for June 6, 1913.

That at all times since January 1st, 1913, the interest of McLure in the said claims was and is of the reasonable value of \$150,000.00.

That there had existed between McLure and Leggat during a period of thirty years a warm friendship, confidence and mutual trust; that they had been repeatedly during said thirty years engaged as co-partners in many mining ventures, and the operation of many mines, and the buying and selling of mines together as joint owners and tenants in common, and at the time of the sale defendant was co-owner in each and all of the said four patented mining claims with plain-



tiff. . . . . That he (defendant), owned the other one-half interest in the Elvina beside the one-half owned by your orator. (Statement that he owned in the other claims an undivided interest proved to be inaccurate.)

(There are several inaccuracies in the bill, due to the fact that the bill was drawn as appeared in the record on telegraphic instructions from St. Louis, where the plaintiff was at the time of the filing of the bill, to his attorneys in Butte).

Paraphrasing further from the bill:

On June 6, 1913, while McLure had great and valuable mining properties, the titles to which were otherwise clear save and except for the said judgment, yet your orator had no cash on hand (this was inaccurate; he had sufficient in bank to pay the judgment); and on the said day he requested the defendant to become a purchaser at the said sale, and hold the title if any were subsequently obtained by the defendant as a mortgage to secure the amount that might be bid by the defendant at the said sale in payment and satisfaction of the judgment and execution. . . . . And the said defendant agreed with your orator that he would bid an amount equal to the judgment as to principal, interest and accruing costs and expenses of sale when the sheriff should offer the said real property above described for sale at the said time. . . . . And the defendant did bid pursuant to his agreement with your orator to hold the said title as security for his bid,

the sum of \$1,004.15, and no greater sum; and thereafter at many times between the 6th day of June, 1913, and the period of redemption of one year allowed by law and statutes in Montana your orator was able to redeem the said above described property, and was willing to do so, and signified his intention and desire to do so to the defendant; that the defendant informed your orator repeatedly that after the period of one year might expire provided there were no redemption he would hold any title that might be obtained by reason of the expiration of time merely as a mortgage to secure the re-payment from your orator of the sum of **\$1,004.15, and interest thereon at the rate of 8% per annum** from the 6th day of June, 1913, until the same should be repaid, and promised and agreed with your orator before the expiration of the said period of redemption, to-wit, June 6, 1914, that if your orator at any time after the said 6th day of June, 1914, would re-pay to the defendant the sum of \$1,004.15, together with interest at the rate of 8% per annum, he would re-convey to your orator all of the real property . . . . . Your orator relied upon the said promise and agreement, and due to such reliance upon such agreement, and the trust and confidence reposed by your orator in the said defendant, the said trust nurtured and raised up by thirty years of intimate acquaintance and business dealings and co-partnership in mining ventures, and in the owning of mining properties, and for no other reason your orator allowed the period of redemption, to-wit, one year from the 6th day of June,

1913, to expire without effecting a redemption of any of the property hereinbefore described.

### AMENDMENT TO BILL.

That on August 10, 1912, plaintiff loaned defendant \$500.00; that no part of the same had ever been paid on the date of the sale. . . . . So that, the actual consideration of said bid by the defendant was only \$504.15.

Further, of the original bill—

That on the 6th day of April, 1915, your orator offered to re-pay to the defendant the sum of \$1,004.15, together with interest thereon, etc., and requested and demanded a reconveyance, etc. That plaintiff is now ready and willing, and hereby offers to pay the said sum provided the defendant will re-convey.

That the sheriff, on the 11th day of June, 1914, made and delivered a deed to the defendant, a copy of which was put forth as an exhibit; that the consideration of the said deed is wholly and grossly inadequate, and in great disparity with the actual value of the property therein, and the said deed was obtained by reason of the trust reposed in the promise and agreement of defendant made to re-convey at any time to your orator the said lands, upon the payment of the said amount of money; that the same constitutes a cloud, etc.; that the said property and all of the same, though consisting of four separate and distinct parcels of land, and your orator's interest in any one piece would have brought, had your orator sought bidders, the amount of the said judgment; that all of the

same was sold in one parcel, and so that nothing like their full value could be realized; that there were no bidders present at the said sale but the defendant, and no other persons present but your orator, the defendant, the sheriff or his deputy, and one of the plaintiffs; that your orator is a man very much advanced in years, to-wit, of approximately the age of seventy years, and during the last two years has suffered much from failing health and sickness.

Followed by the prayer. Sworn to by one of the complainant's solicitors.

The answer set forth certain small counterclaims of moneys loaned which were allowed in the decree.

The court found that all of the allegations of the complaint are true; that all the allegations of the answer of the nature of counterclaim are true. Therefrom the court concludes that the plaintiff is entitled to recover of and from the defendant the interest in the mining claims set out in the complaint and claimed by him, together with the \$500.00 loaned; that the defendant is entitled to recover from plaintiff certain small items of moneys advanced, and the sum of \$1,-004.15, the amount of the bid, with interest.

The court finds other specific allegations to be true, among which, that the defendant bid pursuant to agreement; that plaintiff was led to believe by defendant that he need not redeem within the time fixed by statute in conventional cases, and he relied thereon, and acted accordingly; that the statutory time expired, and thereupon the defendant claimed the property was his,



and refused redemption; that the property was and is worth above \$100,000.00; that very intimate and confidential relations had existed between the parties for thirty years. 25 R. 1 to 27 R. 10. Decree accordingly, 27 R. 10 to 29 R. 20.

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## SUMMARY OF THE EVIDENCE.

### THE FACTS ABOUT WHICH THERE CAN BE NO DISPUTE.

1. In the case at bar there is between the actual value of the land sold and the price paid by Mr. Leggat a larger difference than can be found in any case accessible to us if reported up to date. The property sold,—the interests in four patented mining claims, has the following *indicia* of value. Within one year previous to the sale the Eastern alone had been subjected to an option for eighteen months at the princely sum of \$200,000.00, of which \$20,000.00 had been paid down in cash. The price to be paid for the three-quarters thereof involved in this suit was \$150,000.00, of which \$15,000.00 was paid down in cash. 43 R. 1 to 48 R. 10.

The option did subsequently lapse, but was in force when the sale took place, and pending the option we have the sworn statement of MR. LEGGAT that the inchoate right of dower of Mrs. McLure, the wife of the complainant (then of the age of sixty-eight, and in feeble health), was worth \$40,000.00. 85 R. 1 to 88 R. 30. *When the sale on execution was made \$50,-*

000.00 *had been paid and the option was still in force.*  
83 R. 10 to 30.

Exhibit D. of the plaintiff: 85 R. 1 et seq. On July 31st, 1912, Rod D. Leggat signs an appraisal after an oath that he would truly and fairly appraise the inchoate right of dower of Mrs. Charles D. McLure in the Eastern, the Bland and the Ouichita. He values the inchoate interest in the three-fourths of the Eastern at \$25,000.00; the inchoate interest in the one-sixth in the Bland at \$12,500; the inchoate interest in three-eighths in the Ouichita at \$2,500.00. A few weeks before suit was brought McLure was offered \$40,000.00 cash for two of the interests. 170 R. 10.

#### FACTS SHOWING AGENCY AND GREAT PRE- TENDED AFFECTION AND VALUE OF THE LAND, AS TAKEN FROM THE LET- TERS OF MR. LEGGAT.

Many letters from Mr. Leggat to Mr. McLure were introduced in evidence. We select some excerpts from them. They date over a period of thirty years.

"So you will please let me carry it through at your *dictation*. (Exhibit 23, 167 R. 20, letter from Leggat to McLure, Jan. 4, 1912). This was concerning the negotiations to sell these lands to Wolvin and Hayes.

Exhibit No. 6, 127 R, begins "My dear old Solomon"; a species of undeserved, though possibly not unwelcome flattery, which is found in many of the letters from Mr. Leggat to Mr. McLure. (And likewise frequently in Timon of Athens.) The letters usually com-

mence "My dear Charlie", though in exhibit 8, 132 R., Feb. 10, 1907, we find "My dear old Boy". Exhibit 1, 118 R., Aug. 24, 1909, Mr. McLure is greeted "My dear old true Friend". Exhibit S, 105 R., Oct. 24, 1907, Mr. McLure has become "My dear good true Charlie". The superlative seems to have been reached in exhibit G., 103 R. It commences "My dear true old friend Charlie". Exhibit Q proceeds "You are a hold fast good and true. Good Scotch blood in one's vein's tells of the stock they spring from." (There seems to be a little canny Scotch blood on defendant's side of this case.)

In exhibit B, 46 R., June 7, 1907, Mr. Leggat assumes the lofty role of one who would swear to his own hurt and change not, and who loveth his neighbor as himself. He says: "I thoroughly understand the situation and how Ford and I guess others have tried to steal and do you wrong. I've got no use for a faithless or ungrateful wretch of a man and what I can do to make them do square and straight in all things shall be done by me." Exhibit P, 107 R., June 7, 1907.

As early as Feb. 2, 1905, Mr. Leggat assumed to act as the agent for Mr. McLure. In exhibit F, 90 R., he says: "I have given a verbal lease to a couple of good men on the Eastern, and if they find anything I agree to give them a written lease for the year, 25% royalty. I offered him a one or two year lease 25% royalty", etc.

In Exhibit H, 93 R., May 2nd, 1905, Mr. Leggat

becomes the confidential adviser of Mr. McLure: "As the parties want to go east to see what they can do, I wish you would give me the figures that we ought to put on the Eastern." "I think sixty thousand to seventy-five would be about right for I would like to take now for my interest at the rate of 25 or 30,000 per claim. There is no work being done in the vicinity. Nearest is at the Black Rock, southeast of the Eastern." This letter is also interesting as showing the value which Mr. Leggat then put on the claims. It was in no public appraisal where some purpose might exist to influence buyers, but in a private letter between two men who treated their correspondence with **secrecy**.

In Exhibit R, 104 R., October 18, 1907, we find Mr. Leggat accepting the position of confidential adviser to Mr. McLure about this ground. We quote:

"Now in yours of the 14 you leave it to my judgment to sell and let them develop the Bland. Now Charlie this rather puts me in a position of an adviser as to what you should do with your own."

As early as June 9, 1905, exhibit 1, 94 R., we find Mr. Leggat acting as the agent in fixing the price of the Eastern (certainly a most important part of the management of a mining claim): "I put the price on the Eastern at 110,000, ten per cent to be paid in six months, bal. in one year. You have some stock in the Combination M. & M. Co. that should be transferred to me."

On January 15, 1906, exhibit J, 96 R., Mr. Leggat



acts as agent for the Elvina lode claim, which then stood in the name of Mr. McLure, and was owned actually by the plaintiff and defendant in equal half interests:

"I have leased the Elvina lode claim. The parties want also a bond. This I promised them, but said I would have to consult with you as to the figures."

Again in this exhibit there comes to surface that hard to hide, true, deep affection, a little linguistic jewel. It reads as a letter laid away, in lavender, from a love-lorn lass to a sweetheart on the battle line. The exhibit ends up "For I do long to see you."

There are other bursts of quiet flattery in this lengthy correspondence,—instance exhibit K, 97 R., Feb. 4, 1906:

"Your photograph came in splendid condition this evening, and we are all very much pleased to get it. Wife and Stewart wants it framed right off, so I expect it will be placed in the most conspicuous position in the house. It really is a very good one of you and resembles very much the last 'Lord Provost' of Edinboro that I had the honor of meeting, so there."

Another burst of esteem is found in Exhibit M, 99 R., July 6, 1906: "My dear good old friend: Glad that you are thinking of bringing some of "Clan McLure" with you for their ancestors always thrived in the "Hieland" and it is the place of freedom for them."

This little gem also is found at the close of this exhibit. One might expect it in the sentimental journey of Lawrence Stearn, the flusher of the tear duct:

"With best wishes," etc.

In exhibit L, 98 R., March 30, 1906, we find defendant, then the local steward of the plaintiff investigating the record title of the plaintiff in the Ouichita lode:

"I ordered abstract to be made of the Ouichita lode claim.....The title stands as follows: Charles D. McLure 6-16; P. M. O'Donnell 3-16; Silas F. King 4-16, & Sweeney 3-16—16-16."

It is interesting to note that at that time Mr. Leggat himself did not own any interest whatever in the Ouichita, he could only have been acting for the plaintiff in his investigation.

On Nov. 29, 1906, Mr. Leggat in exhibit N, 100 R., again assumes the role of steward for the plaintiff. "Mr. Wilmot and myself went all over the Eastern, Bland, Ouichita.....I gave him the figures of all the interest you held."

In exhibit 7, 127 R., Jan. 2, 1907, we note a suggestion from the steward: "Just consider my suggestion as to you having power of attorney from Mrs. McLure as well as others, for if any deals are made it would save lots of delay."

On Jan. 28, 1907, exhibit 8, 130 R: "There has been several local parties wanting to tie up Eastern, Bland and Ouichita, but I gave them your direct ultimate terms and figures, and that just staggers them."

A sad echo of Mr. McLure's better days is found in exhibit 12, 137 R., April 8, 1893: "Have been very anxiously looking for draft from you so I could settle the Elvina accounts all up." The entire budget had

come to \$90,000.00, all paid in by McLure to the firm of McLure and Leggat.

This being the tercentenary of Shakespeare's death, as our tribute to the wisdom of the immortal Bard, we insert:

"Timon has been this lord's father,  
And kept his credit with his purse,  
Supported his estate; nay, Timon's money  
Has paid his men their wages; he ne'er drinks  
But Timon's silver treads upon his lip;  
And yet, O! see the monstrousness of man,  
When he looks out in an ungrateful shape,  
He does deny him, in respect of his,  
What charitable men afford to beggars."

Act III., Scene II.

In exhibit 16, 141 R., Dec. 2, 1906, Mr. Leggat put the price on the Eastern and Bland at \$200,000.00, twenty per cent. down, and to use his own language; "Did not bat an eye." In that he speaks again of "C. D. Mc wisdom and nerve."

From a literary standpoint exhibit 19, 144 R., is a classic denouncement of fraud and sharp dealing; nor is exhibit W, 112 R., of Jan. 5, 1906, an unworthy example. How charming it would be to receive the following from an old friend:

"Yours of the second with the new year greetings is at hand. I assure you that I sincerely appreciate the knowledge that you sometime think of your old friend which I do often of mine."

Nor does exhibit U, 108 R., May 7, 1908, lack in literary charm: "I was told by ————— Mrs. McLure is in bad health, which I am extremely sorry to hear. I do hope that ere this she has improved for I know her illness is a great strain on you. Hoping to hear from you soon, and with best wishes and love, I remain", etc.

To fully appreciate exhibit S. 105 R., forget "I think the lady doth protest too much," and then peruse:

"My dear good true Charlie: Tell you the truth, I have no use for a sneak or wishy washy man or wants to crowd the under dog. I guess you and I are alike in that. A square deal for the weak always if they are right."

It is indeed sad that our duty to our client demands that we refresh the court's mind with Byron's criticism of Stearns—"He abandoned to privation his living mother, and would shed tears over the carcass of a dead jackass."

In exhibit 10, 135 R., of May 25, 1907, is found the climax of invited confidence. An invitation is extended to a *cestui que trust*, who might deal in property worth hundreds of thousands of dollars. Mr. Leggat says to McLure:

"One thing I want distinctly understood. If there is any stock or interest transferred to my name I will on demand from you, transfer it at once back to you, so just keep this"—a continuing offer which, but for its



sad betrayal, would have been one of the tokens that in the modern world we had another friendship of Damon and Pythias.

Some say that in the cold science of the law such expressions of endearment are not to be considered. It is elementary that countless wills have been set aside by undue influence gained over unsuspecting old men through such letters and such protestations, and in a case from the Supreme Court, *Whitney v. Hay*, 181 U. S. 77, such letters, set out at length therein from an old couple to a young couple in no wise related by blood or marriage, were a part of the *res gestae* upon which the court based a decree declaring property worth \$25,000 subject to an oral contract to convey.

In exhibit No. 21, 163 R., of date August 10, 1912, is found a reminder of the cowboy artist's, Charlie Russell's, great masterpiece, "The Last of Ten Thousand." (The picture sent to his employer, of the last steer dying in the storm.) It might be styled, however, "The Last of Seventy Thousand"—There had been a donation to Mr. Leggat from Mr. McLure of \$45,000, one-half the expenses of operating the Elvina; a donation of \$20,000, one-half the expense of operating the Chile and the McVey; a donation of \$4,000 to Mr. Leggat, one-half the expense of operating by the two old cronies (when boys) in the Caldwell district.

We are not exaggerating when we call the check for \$500.00 which Mr. McLure on August 10, 1912, gave to Mr. Leggat to take a trip back to St. Louis "The Last of Seventy Thousand."

Words fail the uninspired to draw a parable for this unjust steward. Mr. Leggat could owe Mr. McLure one-half of \$90,000.00 on the Elvina transaction and it was called off and forgiven. Mr. Leggat could owe Mr. McLure one-half of \$40,000.00 on the Chile and McVey transaction, and it was called off and forgiven. Mr. Leggat could owe Mr. McLure one-half of \$8,000.00 on the Caldwell district transaction, and it was called off and forgiven. Mr. Leggat could owe Mr. McLure from August to June \$500.00 for a pleasure trip, and not only the interest but also the principal was forgotten until after this suit was commenced.

Mr. McLure owed Mr. Leggat \$504.15 from June 6, 1913, to June 6, 1914, and Mr. McLure must by reason thereof be stripped, as counsel would have us believe, of property worth from \$150,000.00 to \$250,000.00. The fruits of his early courage and labor, crossing the plains as a freighter. Shakespeare was cheated by having lived before this age; here was a better model for his Shylock than he ever knew.

In testing the veracity of these two men the court can find in the record facts showing their inner character. McLure's unheard of generosity through a period of thirty years shows him to be a man absolutely above being influenced as to his testimony by any love of money. "The ruling passion is strong in death."

While fortune has favored him with great riches, and also chastened him with great financial distress at times, yet in both wealth and poverty the same spirit of gen-

erosity and recklessness about money pervades his life. Probably the loan of \$500.00 to his old friend to take a pleasure trip was a greater strain on his resources than the gift of the \$45,000.00 in the Elvina transaction.

The Master born at Bethlehem lacked such good material for his parable of the Unjust Steward. The Chancellors will recall that the Lord of the House denounced the unjust steward in that while he himself had forgiven the steward a shortage of ten talents in his accounts, the steward had oppressed a third party who owed him one talent. In the instant case the unjust steward has been forgiven ten talents and he would treacherously strip his Lord and Master of all earthly possessions for a one hundred and fiftieth part of the ten talents.

## TESTIMONY OF L. P. SANDERS.

### 41 R. Et Seq.

We commend Louis P. Sanders to the court as a witness entirely disinterested, of excellent memory without his documentary memorandum, and as accurate with his documentary memorandum as any witness who can ever come before the court. We aver that the court must look in vain for testimony superior in its credibility, fairness and freedom from bias. His testimony is relevant from two standpoints,—first, as to the value of the property, and second, and probably more important, as showing that Mr. Leggat was the confidential agent of Mr. McLure. We abridge the testimony of Captain L. P. Sanders (a member of this bar):

Captain Sanders was acquainted with the Eastern, the Ouichita and the Bland. In 1912, as a member of his law firm of Kremer, Sanders & Kremer, he did professional services for Messrs. Wolvin & Hayes, who were negotiating for a portion of the ground described in the bill. His negotiations, extending over quite a period, and prior to the first day of July, 1912, were entirely with Mr. Leggat fixing the price on Mr. McLure's interest. Mr. Sanders' recollection is in his own words:

"Q. At that time did you have any negotiations directly with Mr. McLure?

A. Not prior to the first day of July, 1912. My recollection is that I did not see Mr. McLure until subsequent to that time. Sometime prior to the first of July of that year I had a conference with Mr. Rod D. Leggat in behalf of Wolvin & Hayes' desire to secure an option on this claim,—a three-quarters interest as I recall it in the Eastern belonging to Mr. McLure.....The balance of the claim belonged to T. Stewart White and Mr. Rod D. Leggat. Mr. T. Stewart White, to my knowledge, was never in Montana during these negotiations. I had never seen him; nor was Mr. McLure either. Mr. Leggat advised me that the consideration for the Eastern under the option to Wolvin & Hayes was \$200,000.00, ten per cent. of which was to be paid down simultaneously with the execution of the option, and deposited in the State Savings Bank of Butte, Montana. I inquired of Mr. Leggat as to the means of securing some conveyance or acquiescence in the option from the opposing owners, T. Stewart



White and Mr. Charles D. McLure. At that time he told me substantially,—I cannot repeat the exact language—but he told me substantially that he was handling the matter for T. Stewart White and Charles D. McLure, and that they would be satisfied with whatever he did with reference to this ground.”

Mr. Sanders then produces plaintiff’s exhibit “A” not signed by Mr. White; not signed by Mr. McLure; signed by L. P. Sanders as Agent for Wolvin & Hayes; and signed by Rod D. Leggat, and therein “Rod D. Leggat agrees to sell to A. B. Wolvin and John M. Hayes, all of the Eastern quartz lode mining claim, Survey No. 1230, situate in Silver Bow County, Montana, total purchase price \$200,000.00, if the option be exercised, payments thereof as follows: Ten per cent. on July 1st, 1912”, etc.

And quoting further from the agreement: “Leggat agrees that he will cause to be made and executed good and sufficient deed of conveyance to Wolvin & Hayes, or their assigns to all of the Eastern lode claim free and clear of the incumbrances and dower rights.” It is further recited in this agreement, “Others besides Leggat own the claim described, but he has agreed to cause good and sufficient title to be conveyed.....”

We submit that higher proof of agency could not be produced.

## TESTIMONY OF JAMES E. MURRAY.

64 R.

The testimony of Mr. James E. Murray, another disinterested witness, bears strong resemblance to the testimony given by the attorney for the creditors in the renowned case of Tisdale v. Tisdale, which we shall cite later on in the brief. Mr. Murray personally is entirely disinterested. He had two judgments against Mr. McLure. He had had three, but one was settled by a promissory note, and the promissory note was merged into the second. We abridge Mr. Murray's testimony.

"Q. Did you have a conversation with Mr. McLure wherein Mr. Leggat was present shortly after the sale of this property on the Wight & Pew judgment?

"A. Yes, in fact nearly every conversation I had with Mr. McLure was at times when Mr. Leggat would be present.....After securing judgment I told them that I wanted to know whether he would pay the amount, or whether I should proceed to enforce our claim by selling the property. It seems to me that during these negotiations I learned that the property had been sold under this Wight & Pew judgment, and that it had been bought in by Mr. Leggat; or Mr. McLure told me that they expected to sell the property, and that they did not want me to proceed in any matter so as to complicate the title any further, and that as soon as they sold it our judgment would be paid off, and requested me not to go ahead with it any further,—yes it was subsequent to the time that Mr. Leggat bought the

property in. In fact I was told first. I did not examine the record to see exactly what property was involved, but I was told at first that the Elvina was not included in it, but later on I learned that the whole four claims were included in that sale.

Q. As to this conversation which you say you had with Mr. McLure, do you remember whether Mr. Leggat was present?

A. My recollection is that Mr. Leggat was present.

Q. Did Mr. Leggat say anything at that time?

A. Well, he frequently, and in that conversation and in other conversations assured me that Mr. McLure would pay this judgment....."

"Q. And at any of these conversations that you had with Mr. McLure that you have spoken of, wherein Mr. Leggat was present, did Mr. Leggat say to you or tell you that he was simply holding the property for Mr. McLure?

A. Well, now, I would not say that Mr. Leggat told me that, but Mr. McLure did.

Q. Mr. McLure told you in Mr. Leggat's presence?

A. Yes, sir.

Q. And did Mr. Leggat ever deny it?

A. Never denied it at all at any time.....

A. ....The last conversation I think we had would be a month or two prior to the supplementary proceedings.....

A. There were two or three conversations in which the matter was discussed. Of course the representations made in the first conversation were that Mr. McLure owned the property, and that Mr. Leggat had bid it in and was going to

carry it for him until a sale was made, and in the subsequent conversation they might not have repeated that statement, but the matter was referred to in a way that I was made to understand that they were trying to sell the property and as soon as they would sell it that Mr. Murray would get his money. I was urging them to hurry up and pay the claim that I had against them, and I think Mr. Leggat looked me up once or twice himself and wanted to have me go down to the hotel and meet Mr. McLure, and as I stated, Mr. Leggat was present at nearly every conversation I had.

Q. When you would have these conversations with Mr. Leggat, did he ever at any time claim that he owned the property, or that he was holding it for himself?

A. Never at any of these conversations.

Q. Did he state in any of them that he was holding them for the purpose of a sale, to make a sale?

A. Yes, he did not say he was holding them for the purpose of making a sale, but he told me that they had endeavored to make the sale, and notwithstanding the fact that the companies were holding these options (had) let them lapse, they expected to be able to make a deal with them yet."

Of course Mr. Murray has a remote indirect interest as an attorney in the success of his work against Mr. McLure, but no one can imagine that such an indirect interest would influence a man of Mr. Murray's standing in the community and among his fellows at the bar to bias his testimony. His testimony



is entitled to the same faith that was accorded the attorney for the creditors in the Tisdale case.

WILLIAM McLURE

70 R.

is the son of Charles McLure. After the period of redemption had expired he meets Mr. Leggat in St. Louis about the first of March of 1915. He told Mr. Leggat that he was coming to Butte to try to make a sale of the Butte property.

Q. What properties did he know you were speaking of, and what properties were you speaking of?

A. The Eastern, the Bland and the Ouichita. Those were what I had always spoken of as the Butte properties, and he made no answer in regard to that.

Q. Did he know you were coming to Butte, Montana, to sell this property, or to negotiate for the sale of it last March?

A. He did because I told him so.

Q. Did he make any objections—what, if any, claim of ownership did he make to the property?

A. He did not make any claim of ownership.

Q. Was there anything said about your coming here to represent him in any way?

A. No, sir.

Q. He knew whom you were coming here to represent?

A. Oh, yes.

Q. And who was that?

A. It was my father.

We claim that this testimony is peculiarly cogent in this. The young man in no wise tries to bias his testimony nor to overdo it.

## THE TESTIMONY OF THE PLAINTIFF.

74 R. Et Seq.

Direct Examination by Judge Rasch:

Mr. McLure lives at St. Louis since about 1881, lived in Montana from 1864 to 1881; is now passed seventy-three years of age; came to Virginia City, Montana, about the 4th of July, 1864; engaged in the business of freighting, prospecting and mining. Met Mr. Leggat in 1867 or 1868 in the city of Helena; relations were very friendly. In the early days they had met merely as friends; would always get together, sometimes take dinner together, and sometimes he would go down to the mine above Helena in the Scratch Gravel District, in which Mr. McLure was interested. Social relations had been very intimate.

We shall quote frequently from the witness:

"I knew him in Butte after he moved over there. We always met at the hotels and saloons, or wherever we were to come together. We were always friendly. He has lived in the same neighborhood and our friends were mutual. We were engaged in business together after Granite came up and I had some money. We went into several propositions together. The first business I had with him directly was over at Sand Creek or over at Sappington. Mr. Leggat had been holding the McVey and the Chile claims, two locations. I judge that was in the eighties, about eighty-one

or eighty-two, and I spent \$40,000.00 there. Operations continued nine months or a year." 75 R

"Q. How much of the forty thousand was contributed by Mr. Leggat?

A. None of it. Mr. Leggat was holding the bond and looking after the accounts. I think he paid them after the money was forwarded from St. Louis. Mr. Leggat always had the contract for the work and spending of the money. He supervised it and McLure furnished the money."

The next business venture was in the Cardwell district in Jefferson County. It cost McLure something between seven and nine thousand dollars. McLure contributed only to the funds, Leggat looked after the property, attended to the representation, the discoveries and stakes, handled the money. 78 R.

These two ventures being unprofitable Leggat suggests working the Elvina. They bought up the outstanding interests in the property for \$12,500 every quarter. McLure bought it up and paid the money to Mr. Leggat, and Mr. Leggat carried on the negotiations for them and paid out the money. Even in the early eighties Mr. Leggat was entrusted with the payment of at least twice \$12,500 of McLure's money for the purchase of property. McLure then spent \$90,000.00 in development under the immediate superintendence of Mr. Leggat. 79 R.

When this venture proved a failure we find a settlement of the partnership affairs as grotesque as any that probably ever took place. We quote the words of the plaintiff:

"When we had to shut down on account of the fall in the price of silver, discontinue, one day I says to Rod, 'There is not much chance for any payment back, let's cut the whole thing off and we will divide the property, and we cleared that up entirely.'"

All the money was advanced by McLure. Mr. Leggat had charge of it. He paid the bills.

This brings us down to the dealings with the Eastern. Speaking of the Eastern, Mr. McLure says:

"Why we leased it several times and Mr. Leggat attended to the collection of the royalty. He paid the taxes and such expenses as came along. I always let him do the negotiating. Quite a number of them came to me at different times and asked me to sell it, and I told them to go to Mr. Leggat; he has charge of it."

When Mr. Leggat had concluded the deal on the Eastern in examining the title it was found that the legal title to a portion of the ground stood in the name of Mr. McLure's deceased mother. Mr. Leggat was appointed administrator of the estate of Mr. McLure's deceased mother at the request of Mr. McLure. McLure says that he got thirty per cent. of the payments on the Eastern: One of ten per cent. and one of twenty per cent. Incidentally this would leave the option still in force on the date of the sheriff's sale. They were all patented claims. Mrs. McLure, the wife of the defendant, was at times insane. It was necessary to have a guardian appointed for her and ad-



measure her dower interest in the lands. Three appraisers were appointed, one of whom was the defendant, R. D. Leggat. The original appraisement is introduced in evidence under the testimony of Mr. McLure. The figures of the appraisement have been given. Mr. McLure testified that his wife had no other interest in the property save her inchoate right of dower.

Mr. McLure identifies a vast number of letters from Mr. Leggat about the properties involved in the suit, other business matters, New Year's greetings and other social amenities.

The letters which were introduced were only a small portion of letters received from Mr. Leggat. The balance were offered to counsel for inspection.

Mr. McLure continues his testimony. He is asked what has been the value of these properties involved in this suit since June 1st, 1913, or the first of January, 1913.

"A.....Mr. Channing came after me to get me to set a price on the Eastern....., and he offered me \$100,000.00 and I declined it and said he would have to see Mr. Leggat; that I would not make the price on the property; that Mr. Leggat had charge of it; that the property was held at \$200,000.00. And on the Bland there was one time Mr. Charles S. Warren took the proposition and offered \$80,000.00 cash."

Mr. McLure had bought and sold a great many mining properties, both quartz and placer, for the last

thirty years and had familiarized himself with the values of mining properties—what they were bought and sold for. He qualified himself as well to speak of value as to such properties as anyone possibly could. Coming down to the morning of the sale, Mr. McLure says:

“I got up early in the morning, got my breakfast, went up to the sheriff’s office. I got there about eight o’clock, or I believe a half hour or a quarter of an hour before eight o’clock, and the deputy or clerk was there and I asked them if I could come up and pay off the judgment, stop the sale. In other words, I wanted to save any expense of a sheriff’s sale and he replied to me that the property had been advertised for sale and would have to be sold, and I asked him then what time it would be sold and he said at ten o’clock. I then asked him if he would take my check if I would bid on the property and he said it would have to be a certified check. ‘Well,’ says I, ‘you can telephone to the bank to see whether the check is good,’ and he replied then, he says, ‘Mr. Wight will be here at the sale and if he will take your check it will be all right,’ and my reply was that Mr. Wight had sued me and I would not ask him to take my check; so I came up and went to the hotel, which was at least a few minutes before nine o’clock, and I telephoned to Mr. Leggat and told him what had past, and as Mr. Leggat was an owner in the Elvina claim, (which was in my name, or rather I held it), and I told him they had refused my check, and I says ‘come over,’ and he says ‘all right, I will be right over,’ and he came over and I was sitting in the hotel waiting

for him to come and I saw him coming across the street, and before he had crossed the street I went over and stopped him and I says 'Mr. Leggat, the sale is to be at ten o'clock,' and I says 'they refused my check,' and he says 'they will take my check,' and I says 'will you come up and bid it in,' and he says 'yes,' and I says 'I will give you a check when you come down,' and he says, "all right, I will go up and attend to it' . . . . .; and he said that there had been other bidders and that he had told them it was our joint property, and he said that by his own influence he had persuaded them not to bid against him, so he told them their account would be all right and that he would bid it in and he did bid it in, and I says, 'Rod, if you want a check for this I will give you my check for it,' and he says 'never mind that.'"

There is further testimony that he procured others not to bid; that he would see that their debts were paid and that they would be perfectly secured as the matter was in his hands. The plaintiff testified that in the August before he had loaned Mr. Leggat \$500.00 for a trip to St. Louis; that it had never been repaid. The plaintiff never thought of it until he got to thinking about matters connected with the case, and after the present suit was brought he found the check. The loan was not to bear interest. Mr. Leggat agreed that he would deed the property back to him if it became necessary. Witness proceeds:

"Q. What did you say and what did he say,

if you recall, at that time immediately after the sale?

A. I think I asked him. I says, 'Rod, if the sale goes through, will you make me a deed,' and he said 'yes,' and then I asked him 'In case the sale does not go through will you make a deed back to me, keeping your half interest in the Elvina,' and he says 'Certainly I will.' "

Witness proceeds:

"The Elvina interest stood in McLure's name in July, 1912."

Mr. McLure says, however, he, (meaning Mr. Leggat) was the real owner of one-half and I the other half.

On July 17, 1912, Mr. McLure, though holding the half interest of the Elvina of Mr. Leggat, had joined with Mr. Leggat in a lease and option on the ground to Anderson and Slattendale. The lease was offered in evidence. The witness proceeds: That he saw Mr. Leggat very frequently after that. Mr. Leggat would call on him at the hotel and they were pretty good comrades. Witness, in describing it, answers "Well, you might say friendly more than socially. I don't think there was much socialibility connected with it, but was friendly. Sometimes we would go to (theaters); sometimes we would take the car and ride out to the Lake; sometimes we would ride out to the Gardens."

"Q. Now during the year before the expiration of the time for redemption, did you and him speak about this property?



A. Almost every time we would meet we would be sure to speak about it. I knew it was on his mind and it was in my mind, but I think both needed the money, and both anxious to have the sale consummated and get the money."

The witness explains by sale he meant the transaction with Wolvin and Hayes.

Witness goes on:

Q. Were you in Butte between the 26th day of May and the first day of June of last year?

A. Yes, sir.

Q. Did you have any conversation with Mr. Leggat about this proposition then?"

A. Yes.

Q. Will you state to the court what that conversation was in substance?

A. .... And I said to Rod then, 'within a day or so you will get a deed. I want an understanding about it. If the sale is made will you make a deed over from Wolvin and Hayes to me,' and he said 'yes,' and I said 'In case it does not go through will you make it to me,' and he said 'Certainly.' That was a short time before the limitation ran out.

Q. What do you mean by limitation?

A. I mean what you call the redemption.

Q. Now, Mr. McLure, was anything further said?

A. I told him that 'If you want a check for that I have got one for you,' but I had forgotten about the \$500.00 until I was looking through my papers; but of course he would have gotten my check for whatever he had paid out and I would consider that now as far as that is concerned.

Q. Did you have enough money on hand at that time to have paid \$1,004.00 and interest at the rate of 8% from June 1st, 1914?

A. Yes, sir.

Q. And your check would have been good for that amount?

A. I know it was; yes, sir.

Further the witness proceeds:

When in St. Louis Mr. Leggat always got his mail at the witness' office, though Mr. Leggat had relatives there. Witness proceeds: That in November of last year he commenced negotiations to sell the Butte property. He was going to try to raise some money. He told Mr. Leggat that he was going to do so, and that he needed it. Witness writes to his attorney in Butte to negotiate. Witness said that he would take \$40,000.00 and discussed with Mr. Leggat before that an offer to sell the property for \$100,000.00. Mr. Leggat did not claim to own the property; simply said "Charlie, you are getting pretty low on it. You have come down a good deal." Witness told Mr. Leggat that if he got \$40,000.00 he would expect him to make a deed. Mr. Leggat answers "Certainly I will make a deed."

Witness says that he has been a citizen of Missouri since 1881, and was residing there when this suit was commenced. Witness knows the signature of Mr. Leggat on the back of the check for \$500.00. Witness makes proffer of others letters from Mr. Leggat. Witness explains certain errors in the bill of com-

plaint. In the bill it is alleged that he was present at the sale. Witness says he was not present; that he had entrusted it to Mr. Leggat. Witness says that Mr. Leggat first refused to recognize his ownership after the witness' son had practically sold the property, and had a cash offer of \$40,000.00 for two claims,—the Eastern and the Ouichita, just the interest in the same owned by the witness.

Witness explains the altercation which arose when he accused Mr. Leggat of breach of faith and when the latter made his first claim that it was his own property. Witness explains that Mr. Leggat told him he had sold the property; refused to say what he got for it. Witness explains his ability to pay \$1,004.15 and interest from the date of the sale until the 7th day of April, 1915. Witness announces that he could get that much cash on the day of the hearing. He cannot say that he made an offer to pay it after Mr. Leggat told him that he had sold the property.

Witness instituted suit for an accounting in St. Louis. Mr. Leggat's deposition was taken. Mr. Leggat testified that he had the interest he had bought under the judgment and still had it, and when that fact was found out that suit was dismissed.

Witness immediately wired Mr. Templeman's office and advised to institute proceedings to protect himself against an innocent purchaser, and this suit is on trial. When the suit was brought the witness was in St. Louis and his attorneys were in Butte. Witness recites that in the latter part of January defendant was

perfectly willing to make a deed. Witness recites why he offered a portion of the ground at \$40,000.00. His answer is that he was in considerable need and considered it a sacrifice. The witness recites that Mr. Leggat is at present in Helena at the Placer Hotel, and that he is ready and able and willing to pay either the sum of \$1,004.15 or the sum of \$504.15, whichever may be adjudged, and interest at the rate of eight per cent. per annum from Just 1st, 1913.

Witness offers the monthly accounts rendered by Mr. Leggat with reference to the Elvina Mining company and the Chile company, showing his expenditures, for inspection of counsel.

The cross examination of Mr. McLure developed no inconsistencies in his testimony and brought out no new facts. It is somewhat interesting. The witness' direct testimony embraces 114 pages; his cross less than 21 pages. The sheriff's deed and certificate are in the record.

#### AS TO THE LAW IN MORE DETAIL.

An examination of a quite accurate work, and an article written by Oliver A. Harker, Dean of the College of Law, University of Illinois, and one time Justice of the Appellate Court of the State of Ill., 24 Cyc. 39, Subject "Judicial Sale" has the following to say:

"Inadequacy of the price obtained on the sale, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud, or to



shock the conscience of the court; but when in connection with the inadequacy of price there are other circumstances having a tendency to cause such inadequacy, apparent unfairness or impropriety, the sale may be set aside, although such additional circumstances are slight and, if unaccompanied by inadequacy of price, would not furnish sufficient ground for vacating the sale."

The text is strongly supported by citation to authorities. In a foot-note the author gives instances of gross inadequacy warranting setting aside (evidently without any further circumstances). We quote:

"Property worth one thousand dollars sold for six dollars. *Lankford v. Jackson*, 21 Ala. 650. Property worth two thousand five hundred dollars sold for five dollars. *Daly v. Ely*, (N. Jer. Eq.) 26 Atl. 263. Property worth sixteen thousand dollars sold for seven thousand dollars. *Banning v. Pendery*, 7 Ohio. Dec. 677. Land worth from two to five dollars per acre sold for twenty-eight cents per acre. *Hardin v. Smith*, 49 Tex. 420. Sale for a half or a third of actual value. *Sinnett v. Cralle*, 4 West Va. 600.

The Supreme Court of the United States cites with approval the following language from Mr. Kerr, in his *Treatise on Fraud and Mistake*:

"Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling the transaction."

The court further cites Chancellor De Saussure, quoting with approval:

"I consider the result of the great body of cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general, a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness or the distress and necessity of the vendor, and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct. It is true these observations, both of Mr. Kerr and Chancellor De Saussure were made in reference to private sales between parties, and do not strictly apply to judicial sales, but they show that great inadequacy of price is a circumstance which a court of equity will always regard with suspicion unless it appears by the circumstances of the case, or by evidence, that it is no fault of the buyer."

Graffam v. Burgess, 117 U. S. 195.

In the same case the court uses this language:

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

There is in this opinion other language. It is claimed that Mr. McLure was negligent. For the pur-

pose of the argument we might admit it. What man, after the protestations of thirty years of loyalty and friendship would not be negligent; but the Supreme Court of the United States quotes this language with approval:

"The sale in this case is a great oppression on the complainants. They are ignorant, stupid, *perverse* and poor. They lose by it all their property, and are ill-fitted to acquire more. They are such as this court should incline to protect, notwithstanding perverseness. The Chancellor allowed the complainant to redeem the property by paying the purchase price and costs."

Surely if the Chancellor extends the right to redeem to the *perverse*, his correcting hand will reach forth more willingly in aid of such as are only negligent because confiding. A true man is by virtue of being so himself most confident of the integrity of others.

In much the various Circuit Courts of Appeals are courts of final resort. They are of almost equal dignity with the Supreme Court in point of authority. The Circuit Court of Appeals of the Sixth Circuit, presided over by Taft and Lurton, J. J., in *Magann v. Segal*, 92 Fed., 252, uses the following language:

"Upon the weight of American authority, we conclude that a price so inadequate as to shock the conscience, or mere inadequacy, coupled with misconduct upon the part of those conducting the sale, or fraud, or conduct bordering upon fraud, upon

the part of the purchaser, under the practice of both English and American Courts, has always been regarded as furnishing good cause for re-opening the biddings." Page 259.

And in the decision is tabulated a list of instances and circumstances where mere inadequacy, coupled with any other circumstances, has resulted in setting aside the sale. Pages 262, 263.

The Supreme Court has spoken at great length on a similar case, *Shroeder v. Young*, 161 U. S. 334. We will not quote from the case. We ask full reading, for it sustains our position as to inadequacy of price, if "so gross as to shock the conscience" being sufficient ground in itself. If it is attended with any irregularity such as a sale *enmasse*, or if bidders were kept away, or any undue advantage taken, or a lulling into false security, the sale may be set aside. It disposes of the question raised by objection frequently made in behalf of the defendant that assurances made before the statutory period, and relied on, have to be in writing. The court holds that they do not.

It might be said that there are many leading cases on this general proposition of setting aside judicial sales for inadequacy of price, coupled with irregularities. We commend to the court the case of *Groff v. Jones* (N. Y.), 22 Am. Dec. 545. The history of this case is treated in 22 Am. Dec. 545, Extra Anno. Ed., and it is brought down to a recent date strongly sustained, and often cited. We would say from a glance it had been cited with approval fifty times.



## THE BURDEN OF PROOF.

Mr. McLure had the burden of proof at the opening of the case. In the progress of a trial it frequently happens that if certain facts are established conclusively, or merely by a preponderance of the evidence, then the burden as to other facts in the case is shifted to the defendant. For instance, in setting aside a sale from a ward to a guardian, soon after the majority of the ward, the burden of proof would be on the ward in the first instance to establish the relationship, and perhaps that the transaction was very close after the relationship ended. After such facts were established, as they usually are by conclusive proof or very strong preponderance, the burden would immediately shift upon the guardian to show that the transaction was in all respects fair and regular for an adequate, full, complete consideration. This proposition of law is elementary. We cite it only as illustrative of the point we make.

In the first instance it was on Mr. McLure to establish the fact that a relation of great trust and confidence and agency, stewardship, intimate business relations; intimate social relations had existed between him and Mr. Leggat. This burden has been sustained and overcome as conclusively as any initial burden in a lawsuit ever was or ever will be, and by unimpeachable documents over Mr. Leggat's signature, going through a period of more than a score of years, and in the most intimate relations known to have existed between the two men:

The entrusting by McLure of the expenditure of \$90,000.00 by Leggat in one transaction, \$40,000.00 in another, \$8,000.00 in another, when McLure was in St. Louis and Leggat on the ground; the permitting of Leggat to give leases on the mining ground; the permitting of Leggat to conduct the sales and fix the price of mining ground; Leggat's permission of his half interest in the Elvina to stand in McLure's name for many years; the request of McLure to the courts of Montana that Leggat be appointed administrator of McLure's mother's estate; the assertion in writing that McLure could put any property in Leggat's name and it would be transferred on request.

No attorney could ever gain a more complete confidence of his client than Leggat gained over McLure; no factor a more complete confidence over his principal. This relation is as conclusively established as if it were an admitted fact in the answer of the defendant, and when such relation existed, disregarding for the time being the question of the inadequacy of price, the burden would be upon Mr. Leggat to show the transaction fair and regular in all respects.

Mr. Devlin, in his monumental work on Deeds, 3d Ed., Vol. 2, page 2106, Par. 1108, uses this language:

"A court of equity will closely watch transactions between persons occupying confidential relations toward each other. Where a deed has been made by a person to his confidential agent and adviser, and the grantor claims that it was given and received as security for a loan, the whole

burden of sustaining the validity and good faith of the dealings between the parties is imposed upon the agent and adviser. 'Now it is a well-settled principle of equity jurisprudence,' said Mr. Justice Potter, 'that the court will always look with jealousy upon all transactions between parties so situated; and the burden of proof is entirely upon the guardian, trustee, agent, or other person sustaining this confidential relation, to show that he has taken no advantage of his situation. It is not necessary that there should be fraud to justify the court's interference. In the present case, there were all the elements usually found in cases where the courts have granted relief. There was complete ignorance of business affairs, complete confidence, and the dependence resulting from that confidence on one side, and on the other side, superior business knowledge, and the influence of his position as administrator of her father's estate.' "

The text is well supported by citations. This applies to deeds at judicial sale, as well as to deeds between private parties.

We quote again from Mr. Devlin's monumental work, Par. 1113, page 2116, 3rd Ed.:

"Two persons occupied the position of co-administrators of an estate. One of them made a deed of land to the other, describing him as the administrator of the estate. The grantor having died, a suit was brought by his heirs and representatives to have the deed declared to be a mortgage. The facts were, that the deed was intended only as security for the repayment of funds

of the estate used in paying the purchase money; the grantor continued to reside on the land; he paid taxes on the property, and erected permanent improvements. After the death of the grantor, the grantee stated to a person who desired to buy the property, that he thought he had a mortgage on the property, but, after examining his papers, he ascertained that he had a deed. This statement was not denied or explained by the grantee. The court held that while the evidence must be clear and convincing, yet, that under the circumstances, the deed should be considered to be a mortgage. If an assignment of a certificate of redemption to secure a loan of money which the assignee has made to the redemptioner, with which to make a redemption by means of a second mortgage from a sale made under the foreclosure of a prior mortgage, is, in reality, a hypothecation of the redemptioner's interest in the land, to the lender, the latter, if he obtains the sheriff deed under the certificate assigned to him, will hold as mortgagee and not as absolute owner. If the title is obtained by a person at a judgment sale under an agreement that it is to be security for a debt or for money loaned, the transaction is a mortgage."

And further Mr. Devlin says, Par. 1124:

"If a third person is induced to become a purchaser, and he agrees to convey the premises to the person inducing him to purchase on the payment of a certain sum to him within a certain time, the agreement must be complied with, or all rights to purchase under it are forfeited. A conditional sale and not a mortgage must be the re-



sult where the relation of debtor and creditor is not created. But in equity, if the debtor has any interest in the property, legal or equitable, and obtains a conveyance for a person who advances money therefor, upon an understanding that the title shall be transferred to him upon paying the money advanced, he has the right to redeem from the grantee, who, having secured the title by his act, holds it as his mortgage. Where a person has a contract for the purchase of land, and procures another who takes the deed in his own name to advance the money, the latter is a mortgagee, and his rights and obligations are the same as they would be if the land had been transferred to him by the debtor. But then the person procuring another to purchase land must have either an equitable or legal interest in it, to cause an agreement by the purchaser to convey upon being reimbursed, to constitute the transaction a mortgage. When there is no such interest, the transaction will be regarded as a mere contract of sale. Where a mortgagor after the expiration of the statutory time was allowed to redeem, another person advancing the money, and the mortgagee executed a quitclaim conveyance to the mortgagor, and the latter executed an absolute deed to the person advancing the money, and received back a written agreement giving a certain time to redeem on payment of the money advanced, the conveyance in equity was deemed a mortgage."

And on the subject of parol evidence to declare an absolute deed, whether that of a sheriff or a private party, or anyone else, a mortgage. It is interesting to read Section 1100 of Mr. Devlin.

## THE EFFECT OF MR. LEGGAT'S CO-OWNERSHIP IN THE ELVINA.

On the morning of the sale, if we disregard the lien of judgment against McLure, the equitable title of the Elvina, a claim which had cost McLure \$12,500.00 per quarter, was one-half Leggat's and one-half McLure's, as per the old agreement to declare the \$45,000.00 off which Leggat owed McLure, *and which was without any consideration.* This transaction was, of course, eighteen or nineteen years old, but the statute of limitations on it had not run, and the original calling off was without any consideration. In the initiation of this legal title in McLure there was a debt of \$90,000.00 if it be viewed as the partnership of Leggat and McLure from the firm to McLure; of \$45,000.00 if they be viewed as joint adventurers. Leggat had the right to redeem. McLure had an opposing right to foreclose had he chose to claim the want of all consideration for the release. At this sale, which was coming up, all of McLure's interest was advertised for sale, and that included as well and as truly, the interest of McLure as a lienee on Leggat's half interest as it did his right and title in his own half interest.

This question of the statute of limitations not having run is fixed by statute in Montana, Section 3780 Civil Code of 1895, re-enacted into Section 5723 Revised Codes of 1907, and fortified by judicial decisions of the Supreme Court of the State.

Grogan v. Valley Trading Co., 30 Mont. 231.

These facts beautifully illustrate the wisdom of the courts in announcing the proposition that where one tenant in common buys the common property at a sale under an incumbrance on the joint property, he is deemed to hold the title subject to, and for the benefit of all of his tenants in common. It is presumed that he is acting for himself as well as being a purchaser.

The discussion leads us to the noted case of *Tisdale v. Tisdale*, 2 Snead, 596 (Tenn.) 64 Am. Dec. 775. A long history of the case on the last two pages of the volume as it appears in the extra annotated edition. Quoting from the head lines :

“Tenants in common by descent are by operation of law placed in confidential relation to each other as to joint property; each is prohibited from acquiring rights in it antagonistic to the others, and the same duties are imposed as if a joint trust were created between them, or by the act of a third party.

Implied obligation exists between tenants in common to sustain common interest, which will be enforced in court of equity as trust, and the purchase of an incumbrance or outstanding title upon the joint estate by one in his own name will inure to the benefit of all, but they will be compelled to contribute their respective ratios of the consideration paid.”

It is interesting to note that more than twenty years had elapsed in the *Tisdale* case—“It was more than twenty years from the defendant’s last purchase and

the vestiture of title before the bill was filed." We abridge the facts as stated in the opinion:

Complainants and defendants were the heirs of John Tisdale. Lands were incumbered at the time of his death with a mortgage. The estate was insolvent except for the mortgaged property, and most of the heirs otherwise poor, and unable or unwilling to discharge the mortgage, a decree passed for the sale of the land in foreclosure. To meet this emergency, the defendant Daniel Tisdale and his brother-in-law borrowed \$6,000.00. With this money Daniel attended the sale, and in November, 1830, bought 5,000 acres at 70 cents per acre, and at a sale of the balance in May, 1831, bought 28,580 acres at nine cents per acre. These sales were confirmed and the title vested in the said Daniel individually, who got an agent, Loving, to sell the land. The object of the bill was to make Daniel account for \$47,000 profits from the land. The defense was

(1) That Daniel purchased the land at judicial sale for himself with funds of his own, for which the complainants were in no way liable after they had all failed, and some of them refused to become bound, and consequently he is entitled individually to the benefits of his purchase, as the risk, hazard and trouble were all incurred by him.

(2) That he is protected by the statute of limitations.

We make the following extracts from the opinion:



"Can the ground of defense first stated avail him? We think not, for several reasons."

"Thus circumstanced, then, could he take to himself, individually, the benefits of his purchase, to the exclusion of his co-tenants? Surely not. Nothing is better settled in equity jurisprudence. It is one of the canons of a court of equity that one who undertakes to act for others cannot in the same matter act for himself. Where confidence is reposed, duties and obligations arise which equity will enforce. A trustee cannot throw off the trust at pleasure, to the injury of the *cestui que trust*. He will not be allowed to mix up his own interests and affairs with those of the beneficiary. This doctrine has its foundation, not so much in the commission of actual fraud, but in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth, that 'a man cannot serve two masters.' The right to sell and to buy cannot exist in the same person, because of the antagonistic interest in the two positions. Hence, the fairness or unfairness of the transaction, and the comparison of price and value, or the existence or absence of actual fraud, are not permitted to enter into the consideration of the court. It is enough that the relation of trustee and *cestui que trust* existed. This appearing, the investigation is at an end, and the doctrine applies with all its force. It is certainly too late in the day to require the citation of authorities to establish this doctrine. But they may be found collected in the cases of *Keech v. Sandford*, 1 White & Tudor's Lead. Cas. 47-58,

and *Fox v. Mackreth*, Id. 105-146, as to the two aspects in which we have discussed this case."

Leaving out all questions except the naked one that Leggat was a co-owner in the *Elvina*, the law would presume that he was protecting his own property by the purchase at the sale, and held him as a trustee, but the Circuit Court of Appeals of the Eighth Circuit has announced a broader rule. In *Trice v. Comstock*, 121 Fed. 620, in an opinion written by Mr. Justice Sanborn, the following words appear:

"Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term." *Eoff v. Irvine*, 108 Mo. 378, 383, 18 S. W. 907; *Robb v. Green* (1895) 2 Q. B. 315, 317-320; *Louis v. Smellie*, 73 L. T. N. S. 226, 228. In *Eoff v. Irvine*, after an attorney had examined an abstract of title for a client, and after the relation had ceased, he, by the use of the knowledge he had acquired in the examination, secured the title to the property for himself and his friends, but the court decreed that they held it in trust for his former client. In *Robb v. Green* a manager of a business copied the names of the customers from the order book of his master, the proprietor. After the manager's term of service had ended, he established a business

in competition with that of his master, and proceeded to use the names of customers he had copied to divert business to himself, but the court decided that he held this information in trust for his former master, and enjoined him from using it against him.

Another objection earnestly urged against the equity of the complainants is that Comstock had no discretionary power, no authority to sell the land; that his only agency was to solicit and conduct probable customers to his principals; and that, if he was disabled from purchasing this Buckwater tract, he was disabled from buying any land in Barton county. It does not follow that Comstock was forbidden to purchase any land in Barton county because he was disabled from buying the Buckwater tract. He was prohibited from using the information and advantages he had secured by means of his agency to prevent or hinder his principals from accomplishing the purpose of the agency. His disability extended to all land by the purchase of which through the information and benefits he had derived from the agency he would hinder or obstruct his principal's business of buying and selling lands in Missouri. But it extended no farther. He was at liberty to deal in any lands in Barton county concerning which he had learned nothing by the means of his agency. But he could not lawfully use any information or interest acquired thereby to destroy or to injure the business of his principals.

Nor was discretion or authority to sell these 1,925 acres of land requisite to disable this agent from buying and holding them adversely to his

principals. Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principals to accomplish the purpose for which the agency was established. In *Gardner v. Ogden*, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192, the clerk of the brokers of the plaintiffs was held to be disabled from buying the plaintiffs' property, although he never had any discretion or authority relative to the sale of it. In *Winn v. Dillon*, 27 Miss. 494, 497, *Dillon* was declared to be disabled from purchasing the lands he acquired, although the only authority he ever had was to search out and report their descriptions. In *Davis v. Hamlin*, 108 Ill. 39, 49, 48 Am. Rep. 541, an agent of a lessee to procure amusements for his theater, who never had any authority to deal with the leasehold estate, was held to be disabled from taking a renewal of the lease himself, and was adjudged to hold the leasehold interest which he had secured for the exclusive use and benefit of his principal.

The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interests, powers, or injuries of the parties to the fiduciary relations. It is as broad, general, and universal as the relations themselves, and it charges everything acquired by the use of knowledge secured by virtue of these trust relations and in violation of the duty of fidelity imposed thereby with a constructive trust for the benefit of the party



whose confidence is betrayed. It dominates and controls the relation of attorney and client, principal and agent, employer and trusted employee, as completely as the relation of trustee and *cestui que trust*. In *Greenlaw v. King*, 5 Jur. 19, Lord Chancellor Cottenham, speaking of this doctrine, says: 'This rule was one of universal application, affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest where he had a duty to perform which was inconsistent with the character of purchaser.' In *Hamilton v. Wright*, 9 Clark & F. 111, 122, Lord Brougham declared that it is the duty of a trustee 'to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust.' And on page 124 he said: 'Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust.' The rule upon this subject was clearly and not too broadly stated in the American note to *Keech v. Sandford*, 1 White & T. Lead. Cas. in Eq. 4th Am. Ed. p. 62, 58, in these words: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become as-

sociated.' The facts of the case in hand brought it squarely within this rule, charged the title which the agent Comstock acquired with a constructive trust for the benefit of his principals, and furnished substantial ground for their application to a court of equity for appropriate relief."

While the noted Montana case of *Harris v. Lloyd*, 11 Mont. 391, has been called an expose of how much fraud one co-tenant can perpetrate on another in Montana, yet the decision does not go far enough to shield the defendant in this case. We quote the following language from this opinion:

"It is true that one or two or more tenants in common, holding by a common title, cannot purchase an outstanding title or incumbrance upon the joint estate for his own benefit. Such a purchase inures to the benefit of all because there is an obligation between them resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others." Citing cases.

Mr. Meecham, in the second edition of his work on Agency, published in 1914, Par. 1198:

"For the same reasons, an agent authorized to sell, exchange or lease his principal's property, may not without the latter's consent, become the purchaser or lessee.....

Said a learned Judge: 'If such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced *in spite of fraud or*

*corruption.* Hence the only safe rule in such cases is to treat the contract as void without reference to the question of fraud in fact, unless affirmed by the opposite party. This rule appears to me so manifestly in accordance with sound public policy as to require no authority for its support.'

The prohibition applies, of course, as much to indirect violations as to direct ones."

Continuing Par. 1199:

"It is immaterial here that the principal has not been injured, or that the agent gave him as good terms as anybody would give. Neither is the situation altered, ordinarily, by the fact that the principal had fixed a price at which he was willing to sell, and that the agent buys at that price."

In Sec. 1200 the author maintains that the purchase of an agent at public sale is equally voidable. Nor does it matter that there had been a termination of the agency. We quote Sec. 1210:

"Even though the relation has terminated, the disability in this respect may still continue. Thus in one case it is said: 'The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolate after as before the expiration of the term.' In this case it was held that an agent who, by reason of his employment to assist his principals in selling lands in a tract on which they had an option and which they were

exploiting, had learned of the location, value and possibilities of the tract and who were its owners, would not be allowed, by resigning his agency to purchase the land in his own account and thus defeat his principal's purposes. He was charged as a *trustee*."

As to the sale *en masse* or *in solido*, although the deed does not follow the certificate of sale, which recites that the properties were offered separately, yet both the certificate and the deed are fatally defective to withstand this direct attack, where the price was shockingly inadequate.

We submit that it was the duty of the sheriff under Montana statute, after, if he ever did (which is most probably not the fact) offer the tracts separately, to have offered them two at a time, three at a time, and also have offered the Elvina with the Ouichita, the Ouichita with the Eastern, the Elvina with the Bland, the Eastern with the Bland, etc.

The Illinois statute is substantially the same as ours. We quote from *Cohen v. Menard*, 24 N. E. 605:

"The statutory provisions respecting the sale of realty upon execution is that, if the same is susceptible of division, it shall be sold in separate tracts or lots, and *only so much shall be sold as is necessary to satisfy the execution and costs*.

Revised Statutes C. 77, Par. 12.

It is the established construction of this statute that, where several adjoining tracts of land are levied upon, it is the duty of the sheriff to



offer each subdivision of the lands separately; and if no bid be made upon the tracts when so offered, to add two of them together, and offer them, and so on, until all the tracts have been thus offered; and, if no bids be made, he may then offer and sell the tracts *en masse* for a reasonable price. Day v. Graham, 1 Gilman, 435; Ross v. Mead, 5 Gilman, 171; Stewart v. Croes, Id. 442; Cowen v. Underwood, 16 Ill. 24; Phelps v. Conover, 25 Ill. 309; Morris v. Rovey, 73 Ill. 462; Douthett v. Kettle, 104 Ill. 356. And the rule applies with even greater force where the tracts are separated, if, indeed, tracts having no necessary connection with each other may be properly thus sold. Cases may occur, as held in Cowen v. Underwood and Phelps v. Conover, *supra*, where it might be to the interest of the debtor, or at least work no injury or prejudice to him, to thus sell; but, as there said, ordinarily the proper course would be to adjourn the sale. Of the tracts here levied upon, two of them adjoined, while the third was separated by the river from the other two, and was distant a mile or more. The presumption of law is that the officer did his duty in respect of this sale, but this presumption is overcome by his return. It is the duty of the officer, as said in the case last cited, if he sells *en masse*, to make full return of all the facts. From the return thus made in this case it appears that the officer did not offer even the adjoining tracts together before offering the whole together. The return is unequivocal that he offered the tracts separately, and, receiving no bids, he then offered all together. The debtor had the right, under the statute, to have no more of his property

sold than was necessary to satisfy the debt and costs. The adjoining tracts were shown to have been worth substantially three times as much as could have been demanded upon the execution, and presumably would have sold, if offered for enough to have satisfied the same. This bill is filed by the executors, and by the sole legatee under the will, and by a creditor of the estate, each of whom has such an interest in the subject matter of the litigation as to enable him to maintain this bill. It is shown that the estate is probably insolvent, and the creditor complainant entitled to share in the proceeds of the sale of this property, if it shall be restored to the estate. See *Merwin v. Smith*, 2 N. J. Eq. 193; *Miller v. Carnall*, 22 Ark. 274. Without pursuing that question further, it is clear, we think, that while the certificate of purchase remained the property of Cohen, who was the purchaser at the sale upon the execution issued on the Brickey judgment, the sale was clearly voidable; and when it appears, as it does in this case, that the land was sold at a grossly inadequate price, a court of equity will not hesitate to set the sale aside. If the irregularity was insufficient, of itself, to set the sale aside, a court of chancery, seeing that thereby an unconscionable advantage had been obtained, through and by reason of the failure of the officer to perform his duty, would seize upon the gross inadequacy of price as a ground of equitable interposition. *Davis v. Dock Co.*, 129 Ill. 180, 21 N. E. Rep. 830. By the decree the complainants are required, as a condition to the relief granted, to pay appellant the amount of his bid, with 8 per cent. interest from the day of the sale. This is all that

in equity and in good conscience he has a right to demand, and he should be content to pro rate, in respect of his allowances in the county court, with the other creditors of the estate, in the funds derived from the sale of these lands. The judgment of the appellate court is affirmed."

The proposition here advanced is the only possible true construction of the words "and only so much shall be sold as is necessary to satisfy the execution and the costs."

Our Section 6830 is substantially the same as the Illinois statute. The provision as to "only so much being sold as is necessary" is in even stronger language. It is "after sufficient property has been sold to satisfy the execution, no more can be sold." We have been unable to find any opinions of courts contrary to this proposition which we advance. The Minerd-Cohen case is further instructive. The difference between the actual value, \$5,000.00, and the amount of the bid, \$742.67, is spoken of as grossly inadequate. The difference is less than \$4,300. The difference in the instant case, according to Mr. Leggat's own oath, as to the value, is something more than \$150,000.00.

#### THERE IS ANOTHER IRREGULARITY IN THE SALE.

It was the duty of the sheriff to take personal property first before making any sale at all of the realty. It is undisputed, and appears from the testimony

of the officer of the Miners Savings Bank & Trust Company that Mr. McLure had on deposit on the morning of the sale, \$1035.00, \$30.00 more than enough to satisfy the execution.

It is further told that he notified the sheriff that he had this amount in bank. It is further told that he notified Mr. Leggat that he had announced such fact to the sheriff by offering his check. This situation leaves Mr. Leggat on the horn of the dilemma, either one of which defeats his right to this property. If he was at the sale bidding as McLure's agent, he cannot hold the property by reason of the trust agreement. If he was there bidding for himself with knowledge of this fact, he was no innocent purchaser at an open sale, but a purchaser at a voidable sale with knowledge before bidding, of the facts, which must avoid the sale.

This proposition of law,—personal property must be sold first, is statutory in Montana, (we have quoted enough of it), and was set forth in this execution. We cite the court to

Freeman on Executions, Par. 279, to the effect that the sheriff must levy upon personal property first, and sell it first. The text is supported by *Barthelomew v. Hook*, 23 Cal. 279, and also by cases, from Rhode Island, Virginia, Indiana, Kansas, Minnesota and North Carolina.

There are several decisions from the Montana Supreme Court of interest in this case. The early case of *Reece v. Roush*, 2 Mont. 586, is exactly similar



as to a portion of the facts. Quoting from the opinion:

“Respondents owned and had possession of the lot Nov. 10, 1871, when it was sold by the sheriff under a decree of the District Court; that before the said sale, the appellant and respondents entered into an oral agreement by which the appellant agreed to bid off said property for the respondents, and advance the money therefor, and hold the legal title for the respondents in consideration that the respondents secure payment of the same by rents of certain property. This agreement was executed and the respondents continued in the possession of the lot.....

Do the findings establish an implied or resulting trust? Where the contract to hold land in trust is the means of obtaining the legal title, ‘the trust is not created by the contract but results or is implied from the fraud.’ Browne on Frauds, Sec. 84. ‘If the circumstances are such as to raise a resulting or implied trust upon the conveyance, the person entitled to such beneficial interest has the right, at any time, to declare the trust.’ Perry on Trusts, Sec. 77. The case of *Ryan v. Dox*, 34 N. Y. 307, is directly in point, and reviews carefully the authorities. The facts are substantially the same as those in the case at bar, and it is not necessary to state them. The court held that the purchaser under a foreclosure sale who undertakes to purchase for the benefit of the mortgagor, and thus acquires the title at a price below its value, will be deemed the trustee of the property for whom he has undertaken the purchase. It is no objection that the agreement by which this purchase was made was not in writ-

ing. The law makes him a trustee *ex maleficio*. The statutes of New York contain provisions similar to those of this Territory, which have been cited. The court says: 'When one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse it would be a fraud upon the former to suffer his refusal to work to his prejudice.' It is an established rule in equity that a parol agreement, in part performed, is not within the statute of frauds.

The sixth section of the statute of frauds of California is the same as that of this Territory, which has been cited. In the case of Sandfoss v. Jones, 35 Cal. 486, the court discusses the legal principles, which are applicable to the facts before us, and Mr. Justice Sanderson says: 'So far as the contract relates to the sale of real estate, it amounts to an agreement on the part of Jones and Blanchard to buy the property at sheriff's sale for the benefit of Bartram, who was the execution debtor, and to advance their own money, if necessary, for that purpose. Whether they paid for the real estate wholly or in part, with Bartram's money, or their own exclusively, is immaterial. In either event their agreement was not within the statute of frauds, and was not, therefore, void because it was not in writing,'  
 ..... 'If, however, we consider the averments of the complaint in the light which is most favorable to the defendants, we have a verbal agreement on their part with an execution debtor whose land is about to be sold by the sheriff, to purchase it with their own funds and hold it for

his benefit. Such an agreement is equivalent to a loan of the money and a taking of the title as security for its re-payment; or an agreement by one person to purchase land for the benefit of another under circumstances which would amount to a fraud upon the latter, if the former was allowed to repudiate his promise, and, therefore, not within the statute of frauds.'

These doctrines are maintained in the following cases: *Astor v. L'Amoreux*, 4 Sandf. 524; *Foote v. Foote*, 58 Barb. 258; *Booth's Appeal*, 35 Conn. 1651; *Peabody v. Tarbell*, 2 Cush. 226; *McDonough v. O'Neil*, 113 Mass. 92; *Soggins v. Heard*, 31 Miss. 428; *Price v. Reeves*, 38 Cal. 457."

The practice in these cases in Montana is portrayed in *Toole v. Weirick*, 39 Mont. 359, tried without a jury by the instant presiding judge when occupying the district bench of the state, 39 Mont. 359:

"While there are some cases holding that in a bill to redeem it is necessary to allege a tender, this is not the general rule. It is generally held sufficient that the bill discloses a readiness and intention to pay the amount found due. This is the effect of the decision in *Mack v. Hill*, 28 Mont. 99, 72 Pac. 307, and is the rule announced in 17 Ency. of Pl. & Pr. 965, and 8 Current Law, 1042. The function of a suit to redeem is to adjust the equities of the parties (8 Current Law, 1041); and, where a deed absolute on its face is decreed to be a mortgage, some kind of an accounting is usually necessary, and, because of this fact, it is generally impossible for the party seeking to redeem to make a tender, since the

amount due is unliquidated and uncertain. This is true of the suit before us. If Gilchrist had assumed to make a tender, he would have been altogether uncertain as to the amount to be tendered. The rule is well stated in 27 Cyc. 1855, as follows: 'Where the bill for redemption is framed on the theory that the mortgage debt or some portion of it is still due, it must contain a tender or offer to pay the sum so admitted. If the amount due is unliquidated or disputed, it is sufficient to offer to pay such sum as the court shall find or determine to be justly due, or whatever sum may be found to be due upon taking and stating the account between the parties; and no such offer is necessary where plaintiff alleges that defendant has been already overpaid out of the proceeds of the property.' "

We cite the foregoing as relevant to be considered on the proposition of McLure's offering to pay \$1,004.50 and interest in his bill, and subsequently finding that Leggat owed him \$500.00 which should be deducted; and further on the proposition that no actual tender outside of the offer to pay in the pleadings is necessary. Of course, as McLure testified in the instant case, a tender would have been futile because Leggat had denied the existence of the mortgage..

In the Toole-Weirick case the Supreme Court of Montana mentions the fact that courts should limit the time within which the respondent Gilchrist shall effect a redemption, and the time ought not to exceed ninety days from the time the decree is finally entered.



The complainant submits that the following propositions of law are so well established by authority of the courts, and particularly the courts of the United States, that debate further upon them is foreclosed.

1. That while mere inadequacy of price is not alone sufficient to set aside a judicial sale and permit a party to redeem after the statutory period has expired, yet if the inadequacy of price is so great as to shock the conscience, it is conclusive evidence of fraud (constructive). In such event the sale will be set aside on an offer to redeem, even if made after the period of redemption has expired, and the party offering to redeem has not been guilty of gross laches.

2. That if, in addition to gross inadequacy of price, there be the slightest irregularity, the chancellor will seize upon such irregularity as a badge of oppression and permit the party to redeem after the statutory period has expired.

3. That a sale *en masse* of widely separated pieces of property is such a circumstance as will procure the chancellor to permit the redemption if coupled with gross inadequacy of price.

4. That the sale of an excessive quantity of land is such a circumstance as will procure the chancellor to grant a redemption after the statutory time has expired if coupled with a sale for a grossly inadequate price.

5. That where the buyer has been co-owner with, and co-tenant of the seller in a part of the land sold for many years, and a portion of his own land, to-wit,

the buyer's own undivided interest, is offered for sale in the name of the execution debtor, and the price is grossly inadequate, the chancellor will consider the buyer as acting to protect himself and a trustee for the debtor, such trust growing out of the intimate relations of co-tenants of land.

6. That where there is a relation of great trust and confidence, no matter how it arises, whether from the relation of guardian and ward, attorney and client, priest and parishioner, parent and child, physician and patient, (or "the friend that sticketh closer than a brother"), and there be gross inadequacy of price, the buyer will be held as trustee in an action to redeem after the time has expired.

7. That where there has been an agency about the ground, and one has for a long period of time been in position to learn by reason of such agency A PECULIAR OR LATENT value of the ground, then he cannot, even though the agency be terminated, (to use the language of Judge Sanborn, speaking for the Eighth Circuit Court of Appeals), avoid being prohibited from acquiring rights in that subject matter antagonistic to the person with whose interest he has become associated.

Trice v. Comstock, 121 Fed. 620; 61 L. R. A. 176.

8. The statute of frauds has no application to such a case as the present. To use the language of the Supreme Court of the United States, (Mr. Justice

Harlan, speaking for the court), *Whitney v. Hay*, 181 U. S. 77:

"It is not arbitrary or unreasonable, said the Lord Chancellor in *Madison v. Alderson*, L. R. 8, Appeal Cases, 467-476, to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which *they* (this typographical error in original report) are equities resulting from *res gestae* subsequent to, and rising out of the contract."

9. There was here a grave irregularity by the officer making the sale. The judgment debtor was making profert of personal property, offering his check on a local bank—thus asking the sheriff to take an order on personal property (i. e., money) sufficient to cover the execution. The sheriff announces the sale of real estate must proceed. This act was against the mandate of the court in the execution,—*an irregularity making the sale void*.

10. That where there is gross inadequacy of price or any inadequacy of price, and the execution debtor is lulled to sleep by promises of being permitted to redeem after the time, then if he seeks to redeem as soon as he has a reason to believe that he has been the victim of misplaced confidence he will be permitted to do so.

11. If there is gross inadequacy of price, and there are any circumstances affecting the sale which sup-

pressed the bids, or had a tendency to suppress or influence adversely the bidding made by the buyer or by anyone else, the sale will be set aside and the privilege of redemption extended.

12. It was the statute law unto the sheriff that in selling four separate and distinct pieces of real estate, he offer them separately, and if he failed of bidders, then that he offer two separately, differentiating the allotments; failing of bids, he then would have been compelled to offer three at a time, differentiating the allotment again. This was not done, and there is no pretense that it was done.

This also rendered the sale fatally defective.

We have written at considerable length in this case. We extenuate the fault, if fault it be, that the case means little to the defendant and appellant; much to the appellee; in fact, in one view of the case it means nothing to the appellant, because, under the decree of the court he very properly was awarded all sums of money advanced, with the legal rate of interest for Montana, eight per cent. per annum, and this amount has been paid in to the clerk for him.

To the appellee it means that the fruits of his early toil and adventure, and the large expenditures which he made for the ground when he could afford to do so, are not to be wrested from him by the trickery of a friend, and the imposition upon his confidence in human nature.

From the record here the court can see the propriety of our quite unusual request,—an early decision. We



believe that this record shows the necessity of doing justice as speedily as the orderly conduct of the business of the court will permit. The appellee, as the record shows, has long since past the large allotment of three score years and ten. As shown in the bill, his health is bad.

Such is not the only reason. The record shows judgments obtained against the appellee, liens on this very property, costs accruing, and subject to sale at the hands of creditors whom he has always been willing to pay, and a decree of affirmance here would enable him to pay those who might levy and subject him to the additional chance of not being able to pay them because of the cloud still upon his title, and his inability to dispose of his property by reason of such cloud.

The decree, we believe, should be affirmed.

Respectfully submitted,

GUNN, RASCH & HALL,  
of Helena, Montana,

MAURY, TEMPLEMAN & DAVIES,  
of Butte, Montana,

*Solicitors for the Appellee.*

Service of the foregoing Brief admitted and copy  
received this ..... day of May, 1916.

.....,

.....,

*Solicitors for the Appellant.*

IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE  
**NINTH CIRCUIT**

---

J. C. KENNEDY and A. J. KENNEDY,  
*Petitioners;*

*vs.*

S. T. HILLS, as Trustee,

*Respondent.*

In the Matter of J. C. Kennedy and A. J. Kennedy,  
Doing Business Under the Firm Name of  
J. C. Kennedy & Son, Bankrupts.

---

**ON PETITION FOR REVISION**

---

*Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter of  
Law, a Certain Order of the United States  
District Court for the Eastern District  
of Washington, Southern Division.*

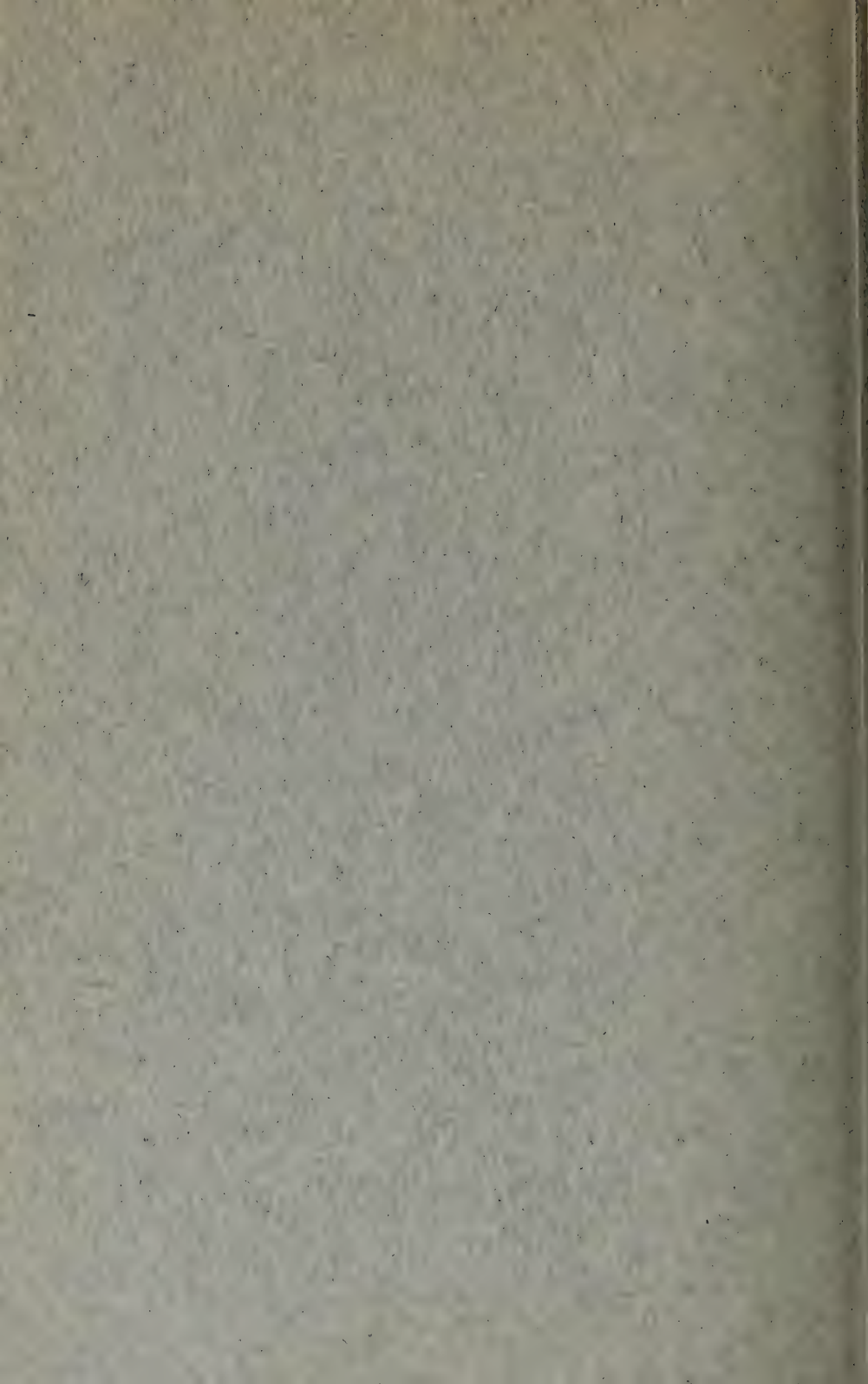
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**OPENING BRIEF OF PETITIONERS.**

---

FABIAN B. DODDS,  
*Attorney for Petitioners,*  
901 Old National Bank Bldg.,  
Spokane, Washington.

---





IN THE  
**United States**  
**Circuit Court of Appeals**  
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IN THE  
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OPENING BRIEF OF PETITIONERS.

---

STATEMENT OF THE CASE.

This is a petition to revise an order of the District Judge affirming an order of the Referee in Bankruptcy refusing to allow as exempt two heavy horses

and harness to the bankrupts, J. C. Kennedy and A. J. Kennedy, respectively, under Subdivision 13, Section 563, Remington & Ballinger's Annotated Codes & Statutes of Washington.

The facts are brief and are as follows:

The bankrupts at the time the Petition in Bankruptcy was filed owned said horses as individuals, and both of them were loggers, were engaged in the business of logging, and had families living with and dependent upon them. That they are claiming no other exemptions as loggers. (Transcript p. 10.)

The Lower Court erred in matter of law in refusing to allow said horses as exempt under said section.

#### ARGUMENT.

The whole statute in question is as follows:

##### "Section 563. SPECIFICATION OF EXEMPT PROPERTY.

The following property shall be exempt from execution and attachment, except as hereinafter specially provided:—

1. All wearing apparel of every person and family;
2. All private libraries, not to exceed five hundred dollars in value, and all family pictures and keepsakes;
3. To each householder, one bed and bedding, and one additional bed and bedding for each additional member of the family, and other house-



hold goods and utensils and furniture not exceeding five hundred dollars, coin, in value. The other household goods and utensils and furniture specified above shall on the demand of the officer having the execution or attachment in hand, be selected by the husband, if present, if not present they shall be selected by his wife, and in case neither husband or wife, nor other person entitled to the exemption by having the description of a householder, shall be present to make the selection, then the sheriff shall make a selection of the household goods, utensils and furniture equal in value to said five hundred dollars, and shall return the same as exempt by inventory, and such selection by the sheriff or other person described above shall be prima facie evidence,—1. That such household goods, utensils, and furniture are exempt from execution and attachment; 2. That the value of the property so selected is not over five hundred dollars;

4. To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section;

5. To a farmer, one span of horses or mules, with harness, or two yoke of oxen, with yokes and chains, and one wagon; also farming utensils actually used about the farm, not exceeding in value five hundred dollars in coin; also one hundred and fifty bushels of wheat, one hundred and fifty bushels of oats or barley, fifty bushels of potatoes, ten bushels of corn, ten bushels of peas, and ten bushels of onions for seeding purposes;

6. To a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also material used in his trade, not exceeding in value five hundred dollars in coin;

7. To a physician, his library, not to exceed in value five hundred dollars in coin; also, one horse, with harness and buggy; the instruments used in his practice, and medicines not exceeding in value two hundred dollars in coin;

8. To attorneys, clergymen, and other professional men, their libraries, not exceeding one thousand dollars, in value; also office furniture, fuel, and stationery, not exceeding in value two hundred dollars, in coin;

9. All firearms kept for the use of any person or family;

10. To any person, a canoe, skiff, or small boat, with its oars, sails, and rigging, not exceeding in value two hundred and fifty dollars;

11. To a person engaged in lightering for his support or that of his family, one or more lighters, barges, or scows, and a small boat, with oars, sails, and rigging, not exceeding in the aggregate two hundred and fifty dollars, in coin, value;

12. To a teamster or drayman engaged in that business for the support of himself or his family, his team, consisting of one span of horses, or mules, or two yoke of oxen, or a horse and mule, with harness, yokes, one wagon, truck, cart, or dray;

13. *To a person engaged in the business of logging for his support or that of his family, three yoke of work cattle and their yokes, and axes, chains, implements for the business, and camp equipments, not exceeding three hundred dollars, coin, in value;*

14. A sufficient quantity of hay, grain, or feed to keep the animals mentioned in the several subdivisions of this chapter for six weeks. But no property shall be exempt from an execution issued upon a judgment for the price thereof, or any part of the price thereof, or for any tax levied thereon.

Each person shall be entitled to select the property to which he is entitled under the several subdivisions of this section. (Cf. L. '54, p. 178, Sec. 253; L. '69, p. 87, Sec. 343; L. '79, p. 157, Sec. 1; Cd. '81, Sec. 347; L. '83, p. 36, Sec. 1; Y. '86, p. 96, Sec. 1; 2 H. C., Sec. 486.)"

We think it will be conceded that the Courts have uniformly construed exemption laws very liberally, and in construing these statutes the Courts have also held that where the intention of the Legislature was to provide a means of support that the statute should not be strictly construed, or necessarily limited, to the exact words of the statute.

In *State vs. Cunningham*, 6 Neb. 90, the Court says:

“‘One yoke of oxen, or pair of horses, in lieu thereof.’ (Quoted from the statute.) Mules, are not named in the statute, but the object of the law is to exempt a team for the debtor. If therefore his team consists of mules, they are exempt, although not specifically designated in the statute.”

See also

*Washburn vs. Goodheart*, 88 Ill. 229;

*Allison vs. Brookshire*, 38 Tex. 199.

It will be noticed that Subdivision 13 of the statute in question uses the term “work cattle.” There are two reasons why this term should be construed to include the horses claimed herein. First: Because the term “cattle” includes the term “horses”; Second: Because at the time this statute was passed, more than fifty years ago, both oxen and horses were used in logging, oxen being used almost exclusively. As time passed, however, the number of oxen used in logging decreased, the number of horses used increased.

Taking up our first contention; the term “cattle” is a generic term, including both cattle, horses, mules, asses, and practically all domesticated quadrupeds used as beasts of burden.

It is true that the authorities are conflicting, the



following cases holding that the term "cattle" includes horses:

*State vs. Hambleton*, 22 Mo. 452;

*State vs. Clefton*, 24 Mo. 376.

These cases were criminal cases and therefore strictly construed, and yet the term "cattle" is held to include horses.

See also

*Ohio vs. Brubaker*, 47 Ill. 462;

*Henderson vs. Railway Company*, 81 Mo. 60;

*Louisville Railway Co. vs. Ballard*, 59 Ky. 177;

*Newark Railway Co. vs. Hunt*, 12 Atl. 697.

It will be noticed that nearly all of the cases construing the law at the time this statute was passed construed the word "cattle" to include horses.

In *Bloomer vs. Todd*, 3 Wash. Ter. 599, the Court said:

"The ordinary use of words at the time when used and the meaning adopted at that time is usually the best guide for ascertaining legislative intent."

Passing to our second contention; it will be noticed that Subdivision 5 of the statute in question mentions horses, mules, and oxen, yokes and chains; Subdivision 7, horses, with harness and buggy; Subdivision 12,

team, horses, mules, oxen. In Subdivision 13, however, the Legislature uses the words "work cattle," which, as we have seen, include the other terms mentioned. Had the Legislature meant to limit this to oxen, why did they not say so? They evidently did not mean to limit the claimant to either oxen or horses, but gave him the benefit of both in the generic term "cattle." If this section is not so construed, it has no meaning, because the Legislature could just as easily have said "oxen" had they so meant.

In 11 R. C. L. 520, it is said:

"An exemption of a horse as a 'beast of the plow' would seem to cover any work horse."

See also 11 R. C. L. 519.

Further illustrating how statutes of this kind have been construed by the Courts, see

*McElveen vs. Goings*, 41 So. 229, 116 La. 977, where the Court held that exemption statutes designated horses also included mules.

In *Kennedy vs. Bradbury*, 55 Me. 107, 92 Am. Dec. 572, it was held that a horse includes a colt.

Also *Richardson vs. Duncan*, 49 Tenn. 220.

In *Roberson vs. Robertson*, 2 Wellson Cup. Cas. Ct. App. 254, it was held that the term horse includes jackass.

In *Roberts vs. Parker*, 117 Ia. 389, 90 N. W. 744, the Court construed an exemption statute allowing "a team with vehicle" to include a bicycle, although a bicycle was unknown at the time the statute was passed.

In *Parker vs. Sweet*, 12 S. W. 881, the Court said, in allowing an automobile as one "carriage or buggy":

"Of course automobiles were unknown to our lawmakers when the statute under consideration was passed (1897) and they could not have had in mind specifically to exempt such vehicle, but this was not necessary."

See also

*Peevehouse vs. Smith*, 152 S. W. 1196.

As before stated, exemption statutes have always been construed, and should be construed, to allow to the claimant his exemptions, if possible, and to effect the intentions of the Legislature to allow the claimant a means for earning his living.

We therefore respectfully contend that the order of the District Judge should be reversed.

Respectfully submitted.

FABIAN B. DODDS,

*Attorney for Petitioners.*





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

AMERICAN NATIONAL BANK, a Corporation,  
Plaintiff in Error,  
vs.  
BANK OF BANDON, a Corporation,  
Defendant in Error.

---

**Transcript of Record.**

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Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

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**Filed**

APR 8 - 1916

**F. D. Monckton,**



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States District Court, in and for the  
Northern District of California, Second Division.*

(No. 15,831.)

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,  
Defendant.

### **Complaint.**

Plaintiff complains and alleges:

#### **I.**

That plaintiff is now and at all of the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Oregon, and having its principal place of business in the city of Bandon in said State of Oregon; that said plaintiff is now and at all of the times herein mentioned was a citizen and resident of said State of Oregon, and at all of the times herein mentioned did, and still does, conduct, and transact a business of general banking in said city of Bandon, State of Oregon.

#### **II.**

That defendant is now and at all of the times herein mentioned was a national banking corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the city and county of San Francisco, State of California. That the

place where the operations of discount and deposit are carried on by defendant is now, and at all of the times herein mentioned, was the said city and county of San Francisco, in the State of California. That the said defendant is now [1\*] and at all times herein mentioned was a citizen and resident of the said Northern District of the State of California.

### III.

This controversy is wholly between citizens and residents of different States, to wit, a controversy between the plaintiff, a citizen and resident of the State of Oregon, and the defendant, a citizen and resident of the State of California.

### IV.

That the controversy herein involves, exclusive of interest, a sum in excess of the sum of Three Thousand Dollars (\$3,000), to wit, the sum of Six Thousand Dollars (\$6,000).

### V.

That for more than one year prior to the 15th day of December, 1913, the defendant herein had been and was the San Francisco correspondent of the plaintiff herein, and that for more than one year prior to the said 15th day of December, 1913, Alfred Johnson Lumber Company, a corporation, was a client and customer of said plaintiff herein. That said Alfred Johnson Lumber Company, a corporation, was on the 15th day of December, 1913, and for more than one year prior thereto had been engaged in the business of cutting lumber in and near the said town of Bandon, State of Oregon, and shipping the

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\*Page-number appearing at foot of page of original certified Record.

same by sea to said city and county of San Francisco, State of California, and elsewhere; and that on divers occasions prior to said 15th day of December, 1914, the said Alfred Johnson Lumber Company, a corporation, had drawn its draft in favor of said plaintiff herein on the Robert Dollar Company, a corporation, having its principal place of [2] business in the city and county of San Francisco, State of California, against cargoes of lumber shipped from said city of Bandon to the said city and county of San Francisco; that on divers occasions the said plaintiff herein had forwarded said drafts to the said defendant herein for collection and upon receipt from said defendant of the acceptance of said drafts, said plaintiff had on divers occasions paid out the money thereon to the said Alfred Johnson Lumber Company, a corporation.

## VI.

That heretofore, and on the said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, made and issued its certain draft in words and figures following, to wit:

“\$6,000.00                      Bandon, Ore., Dec. 15, 1913.

At sixty days sight pay to the order of Bank of Bandon, Bandon, Ore. Six Thousand and no/100 Dollars value received and charge the same to the account of Alfred Johnson Lumber Co.

S. P. BARTLETT,

Treas.

To the Robert Dollar Co.

160 California St.,

No. 17.

San Francisco, Cal.”

## VII.

That on said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, delivered said draft to the plaintiff herein and that then and thereupon, and on said 13th day of December, 1913, the said plaintiff herein endorsed on the back of said draft the following: [3]

“Pay to the order of American National Bank, San Francisco, Cal. All prior endorsements guaranteed. Bank of Bandon, Bandon, Ore.

F. J. FAHY,  
Cashier.”

and that then and thereupon and on said 15th day of December, 1913, in accordance with the custom established between plaintiff and defendant herein, as aforesaid, forwarded the said draft to the said defendant herein.

## VIII.

That thereafter and on the 19th day of December, 1913, the said defendant herein notified and advised the plaintiff that the said draft had been accepted by the said drawee Robert Dollar Company, a corporation.

## IX.

That in truth and in fact, the said draft had not been accepted but that on said 19th day of December, 1913, the said draft was refused acceptance by the said Robert Dollar Company, a corporation; but that the said defendant did not notify said plaintiff that said draft had been refused acceptance until the 29th day of December, 1913.



## X.

That said Alfred Johnson Lumber Company, a corporation, conducts a certain lumber mill near said town of Bandon, State of Oregon. That between said 19th day of December, 1913, and said 29th day of December, 1913, the said plaintiff herein advanced to said Alfred Johnson Lumber Company, a corporation the sum of Four Thousand Five Hundred Dollars (\$4,500) upon the said draft, which said sum of Four Thousand Five Hundred Dollars (\$4,500) was used by said Alfred Johnson Lumber Company, a corporation, for its payroll at said lumber mill, and that the labor for which said Four Thousand Five Hundred [4] Dollars (\$4,500) was expended, by the said Alfred Johnson Lumber Company, a corporation, was used to produce a certain cargo of white cedar, and that prior to the said 29th day of December, 1913, and subsequent to the 19th day of December, 1913, and the receipt of notice and advice hereinbefore set forth at paragraph VIII herein, the said cargo of white cedar was worth the sum of Twelve Thousand Dollars (\$12,000) and was shipped in said town of Bandon by the steamer "Grace Dollar" to said city and county of San Francisco, and that if said plaintiff had known that said draft had not been accepted, said plaintiff could and would have commenced suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of Four Thousand Five Hundred Dollars (\$4,500), and could and would have attached said cargo of white cedar, and that by reason of the notice and advice hereinbefore set forth in paragraph VIII herein, and for no

other reason, said plaintiff did not commence suit against said Alfred Jackson Lumber Company, a corporation, to recover said sum of Four Thousand Five Hundred Dollars (\$4,500) and did not attach said cargo of white cedar or any portion thereof for said sum of Four Thousand Five Hundred Dollars (\$4,500) or any sum.

### XI.

That shortly after said 29th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, became and remained, and ever since has been, and still is, insolvent and unable to pay its debts.

### XII.

That as a result of the acts and negligence of defendant as aforesaid, plaintiff has been injured in the sum of Four Thousand Five Hundred Dollars (\$4,500).

And for a further and second cause of action against [5] defendant, plaintiff alleges:

#### I.

That plaintiff is now, and at all of the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Oregon, and having its principal place of business in the city of Bandon, in said State of Oregon; that said plaintiff is now and at all of the times herein mentioned was a citizen and resident of said State of Oregon, and at all of the times herein mentioned did, and still does, conduct and transact a business of general banking in said city of Bandon, State of Oregon.

## II.

That defendant is now and at all of the times herein mentioned was a national banking corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the city and county of San Francisco, State of California. That the place where the operations of discount and deposit are carried on by defendant is now, and at all of the times herein mentioned, was the city and county of San Francisco, in the State of California. That the said defendant is now, and at all times herein mentioned was a citizen and resident of the said Northern District of the State of California.

## III.

This controversy is wholly between citizens and residents of different states, to wit, a controversy between the plaintiff, a citizen and resident of the State of Oregon, and the defendant, a citizen and resident of the State of California.

## IV.

That the controversy herein involves, exclusive of [6] interest, a sum in excess of the sum of Three Thousand Dollars (\$3,000), to wit, the sum of Six Thousand Dollars (\$6,000).

## V.

That for more than one year prior to the 15th day of December, 1913, the defendant herein had been and was the San Francisco correspondent of the plaintiff herein, and that for more than one year prior to the said 15th day of December, 1913, Alfred Johnson Lumber Company, a corporation, was a

client and customer of said plaintiff herein. That said Alfred Johnson Lumber Company, a corporation, was, on the 15th day of December, 1913, and for more than one year prior thereto had been engaged in the business of cutting lumber in and near the said town of Bandon, State of Oregon, and shipping the same by sea to said city and county of San Francisco, State of California, and elsewhere; and that on divers occasions prior to said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, had drawn its draft in favor of said plaintiff herein on the Robert Dollar Company, a corporation, having its principal place of business in the city and county of San Francisco, State of California, against cargoes of lumber shipped from said city of Bandon to the said city and county of San Francisco; that on divers occasions the said plaintiff herein had forwarded said drafts to the said defendant herein for collection and upon receipt from said defendant of the acceptance of said drafts, said plaintiff had on divers occasions paid out the money thereon to the said Alfred Johnson Lumber Company, a corporation.

#### VI.

That heretofore, and on the said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, made and issued its certain draft in words and figures following, to wit: [7]

“\$6,000.00.

Bandon, Ore., Dec. 15, 1913.

At sixty days sight pay to the order of Bank of Bandon, Bandon, Ore. Six Thousand and no/100



Dollars value received and charge the same to the account of Alfred Johnson Lumber Co.

S. P. BARTLETT,

Treas.

To the Robert Dollar Co.,

160 California St.,

No. 17.

San Francisco."

VII.

That on the said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, delivered said draft to the plaintiff herein and that then and thereupon, and on said 15th day of December, 1913, the said plaintiff herein endorsed on the back of said draft the following:

"Pay to the order of the American National Bank, San Francisco, Cal. All prior endorsements guaranteed. Bank of Bandon, Bandon, Ore.

F. J. FAHY,

Cashier."

and that then and thereupon and on said 15th day of December, 1913, in accordance with the custom established between plaintiff and defendant herein, as aforesaid, forwarded the said draft to the said defendant herein.

VIII.

That thereafter and on the 19th day of December, 1913, the said defendant herein notified and advised the plaintiff that the said draft had been accepted by the said drawee, Robert Dollar Company, a corporation.

## IX.

That in truth and in fact, the said draft had not been [8] accepted but that on said 19th day of December, 1913, the said draft was refused acceptance by the said Robert Dollar Company, a corporation; but that the said defendant did not notify said plaintiff that said draft had been refused acceptance until the 29th day of December, 1913.

## X.

That on the said 19th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, was and ever since has been indebted to this plaintiff in a sum in excess of the sum of One Thousand Five Hundred Dollars (\$1,500); that on the 23d day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, had in said city of Bandon, State of Oregon, a certain cargo of white cedar of the value of about Twelve Thousand Dollars (\$12,000), which said cargo of white cedar was shipped in said town of Bandon by the steamer "Grace Dollar" to said city and county of San Francisco, and that if plaintiff had known that said draft had not been accepted, said plaintiff could and would have commenced suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of One Thousand Five Hundred Dollars (\$1,500), and could and would have attached said cargo of white cedar, and that by reason of the notice and advice hereinbefore set forth in paragraph VIII herein, and for no other reason, said plaintiff did not commence suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of One

Thousand Five Hundred Dollars (\$1,500) and did not attach said cargo of white cedar, or any portion thereof for said sum of One Thousand Five Hundred Dollars (\$1,500), or any sum.

XI.

That shortly after said 29th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, became and [9] remained, and ever since has been, and still is, insolvent and unable to pay its debts.

XII.

That as a result of the acts and negligence of defendant, as aforesaid, plaintiff has been injured in the sum of One Thousand Five Hundred Dollars (\$1,500).

WHEREFORE, plaintiff prays judgment for Six Thousand Dollars (\$6,000), together with interest thereon, and its costs of suit.

MASTICK & PARTRIDGE,  
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 19, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

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*In the United States District Court, in and for the  
Northern District of California, Second Division.*

No. 15,831.

BANK OF BANDON, a Corporation,  
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,  
Defendant.

**Answer.**

The defendant, the American National Bank, a corporation, answers the complaint in this action, and denies each and every allegation thereof.

EDGAR C. CHAPMAN,

Attorney for Defendant.

WILLIAM P. HUBBARD,

Of Counsel.

Receipt of a copy of the within Answer is hereby admitted this 28th day of January, 1915.

MASTICK & PARTRIDGE,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

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At a stated term, to wit, the July term A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Tuesday, the 14th day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,831.

BANK OF BANDON

vs.

AMERICAN NATIONAL BANK.



**Order Allowing Plaintiff to File Amended  
Complaint, etc.**

By consent it was ordered that plaintiff may file its amended complaint herein and that the answer heretofore filed stand as the answer to the amended complaint. [12]

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*In the United States District Court, in and for the  
Northern District of California, Second Division.*

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,  
Defendant.

**Amended Complaint.**

Now comes the plaintiff in the above-entitled cause and with leave of Court first had and obtained files this, its amended complaint, and complains and alleges:

I.

That plaintiff is now and at all of the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Oregon, and having its principal place of business in the city of Bandon in said State of Oregon; that said plaintiff is now and at all of the times herein mentioned was a citizen and resident of said State of Oregon, and at all of the times herein mentioned did,

and still does, conduct and transact a business of general banking in said city of Bandon, State of Oregon.

## II.

That defendant is now and at all of the times herein mentioned was a national banking corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the city and county of San Francisco, State of California. That the place where the [13] operations of discount and deposit are carried on by defendant is now, and at all of the times herein mentioned, was the said city and county of San Francisco, in the State of California. That the said defendant is now and at all times herein mentioned was a citizen and resident of the said Northern District of the State of California.

## III.

This controversy is wholly between citizens and residents of different states, to wit, a controversy between the plaintiff, a citizen and resident of the State of Oregon, and the defendant, a citizen and resident of the State of California.

## IV.

That the controversy herein involves, exclusive of interest, a sum in excess of the sum of three thousand dollars (\$3,000), to wit, the sum of Six Thousand Dollars (\$6,000).

## V.

That for more than one year prior to the 15th day of December, 1913, the defendant herein had been and was the San Francisco correspondent of the plaintiff herein, and that for more than one year prior to the

said 15th day of December, 1913, Alfred Johnson Lumber Company, a corporation, was a client and customer of said plaintiff herein. That said Alfred Johnson Lumber Company, a corporation, was on the 15th day of December, 1913, and for more than one year prior thereto had been engaged in the business of cutting lumber in and near the said town of Bandon, State of Oregon, and shipping the same by sea to said city and county of San Francisco, State of California, and elsewhere; and that on divers occasions prior to said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, had drawn its draft in favor of said plaintiff herein on the Robert Dollar Company, a corporation [14] having its principal place of business in the city and county of San Francisco, State of California, against cargoes of lumber shipped from said city of Bandon to the said city and county of San Francisco; that on divers occasions the said plaintiff herein had forwarded said drafts to the said defendant herein for collection and upon receipt from said defendant of the acceptance of said drafts, said plaintiff had on divers occasions paid out the money thereon to the said Alfred Johnson Lumber Company, a corporation, and that long prior to the said 15th day of December, 1913, an understanding and agreement had been entered into between the plaintiff and the defendant herein, to the effect that in the event that any draft forwarded by plaintiff to defendant for collection, should be dishonored or refused payment, in excess of the sum of \$500, that the said defendant should immediately thereupon no-

tify the said plaintiff by telegraph.

## VI.

That heretofore, and on the said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, made and issued its certain draft in words and figures following, to wit:

“\$6,000.00                      Bandon, Ore., Dec. 15, 1913.

At sixty days sight pay to the order of Bank of Bandon, Bandon, Ore. Six Thousand and no/100 Dollars value received and charge the same to the account of Alfred Johnson Lumber Co.

S. P. BARTLETT,

Treas.

To the Robert Dollar Co.

160 California St.,

San Francisco, Cal.

‘No. 17.’”

## VII.

That on said 15th day of December, 1913, the said Alfred [15] Johnson Lumber Company, a corporation, delivered said draft to the plaintiff herein and that then and thereupon, and on said 15th day of December, 1913, the said plaintiff herein endorsed on the back of said draft the following:

“Pay to the order of the American National Bank, San Francisco, Cal. All prior endorsements guaranteed. Bank of Bandon, Bandon, Ore.

F. J. FAHY,

Cashier.”

and that then and thereupon and on said 15th day of December, 1913, in accordance with the custom



established between plaintiff and defendant herein, as aforesaid, forwarded the said draft to the said defendant herein.

### VIII.

That thereafter and on the 19th day of December, 1913, the said defendant herein notified and advised the plaintiff that the said draft had been accepted by the said drawee Robert Dollar Company, a corporation.

### IX.

That in truth and in fact the said draft had not been accepted but that on said 19th day of December, 1913, the said draft was refused acceptance by the said Robert Dollar Company, a corporation; but that the said defendant did not notify said plaintiff that said draft had been refused acceptance until the 29th day of December, 1913.

### X.

That the said defendant did not cause the said draft to be protested on said 19th day of December, 1913, or at any other time, until the 30th day of December, 1913, nor did the said defendant cause any notice of protest or of the dishonor of the said draft to be given to the said Alfred Johnson Lumber Company, the drawer of said draft, until notice of said protest and of said dishonor were sent to the said Alfred Johnson Lumber [16] Company, in Bandon, Oregon, which said protest was mailed to the said drawer of said draft on the 30th day of December, 1913, and arrived in the said town of Bandon on the 3d day of January, 1914.

## XI.

That the said plaintiff paid out to the said Alfred Johnson Lumber Company the sum of \$5,887.78, which said sum of \$5,887.78 was used by said Alfred Johnson Lumber Company, a corporation, for its pay-roll at said lumber mill, and that the labor for which said \$5,887.78 was expended, by the said Alfred Johnson Lumber Company, a corporation, was used to produce a certain cargo of white cedar, and that prior to the said 29th day of December, 1913, and subsequent to the 19th day of December, 1913, and the receipt of notice and advice hereinbefore set forth at paragraph VIII herein, the said cargo of white cedar was worth the sum of Twelve Thousand Dollars (\$12.000) and was shipped in said town of Bandon by the steamer "Grace Dollar" to said city and county of San Francisco, and that if said plaintiff had known that said draft had not been accepted, said plaintiff could and would have commenced suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of \$5,887.78, and could and would have attached said cargo of white cedar, and that by reason of the notice and advice hereinbefore set forth in paragraph VIII herein, and for no other reason, said plaintiff did not commence suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of \$5,887.78, and did not attach said cargo of white cedar or any portion thereof for said sum of \$5,887.78, or any sum.

## XII.

That shortly after said 29th day of December,

1913, the said Alfred Johnson Lumber Company, a corporation, became and remained, and ever since has been, and still is, insolvent and unable to pay its debts. [17]

XIII.

That as a result of the acts and negligence of defendant as aforesaid, plaintiff has been injured in the sum of \$5,887.78.

WHEREFORE, plaintiff prays judgment for the sum of Five Thousand Eight Hundred Eighty-seven and 78/100 Dollars (\$5,887.78), together with interest thereon, and its costs of suit.

MASTICK & PARTRIDGE,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 14, 1915. Walter B. Mal-  
ing, Clerk. [18]

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*In the United States District Court, in and for the  
Northern District of California, Second Divi-  
sion.*

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,  
Defendant.

**Answer to Amended Complaint.**

Comes now the defendant herein, and in answer to plaintiff's amended complaint, denies generally and specifically each and all and every allegation therein contained.

WHEREFORE, defendant prays that it be hence dismissed with its costs herein.

EDGAR C. CHAPMAN,

Attorney for Defendant.

WM. P. HUBBARD,

Of Counsel.

[Endorsed]: Filed September 15, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,

Defendant.

**Verdict.**

We, the jury, find in favor of the plaintiff, and assess the damages against the defendant in the sum of Five Thousand Eight Hundred and Eighty-seven 78/100 Dollars.

A. W. LAWSON,

Foreman.

[Endorsed]: Filed Sept. 15, 1915. Walter B. Maling, Clerk. [20]



*In the United States District Court, in and for the  
Northern District of California, Second Division.*

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,  
Defendant.

**Judgment on Verdict.**

This cause having come on regularly for trial upon the 14th day of September, 1915, being a day in the July, 1915, term of said court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issues joined herein; John S. Partridge, Esq., appearing as attorney for plaintiff, and W. P. Hubbard and Edgar C. Chapman, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 14th and 15th days of September, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Five Thousand Eight Hundred and Eighty-seven 78/100 dollars. A. W. Lawson, Foreman,"

and the Court having ordered that judgment be entered in accordance with said verdict and for costs.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the Bank of Bandon, a corporation, plaintiff, do have and recover of and from American National Bank, a corporation, defendant, the sum of Five Thousand Eight Hundred Eighty-seven and 78/100 (\$5,887.78) Dollars, together with its costs in this behalf expended taxed at \$59.65. [21]

Judgment entered September 15, 1915.

WALTER B. MALING,  
Clerk.

A true copy. Attest:

[Seal] WALTER B. MALING,  
Clerk.

[Endorsed]: Filed September 15, 1915. Walter B. Maling, Clerk. [22]

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*In the District Court of the United States, for the  
Northern District of California.*

No. 15,831.

BANK OF BANDON

vs.

AMERICAN NATIONAL BANK.

**(Clerk's Certificate to Judgment-roll.)**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the

above-entitled action.

ATTEST my hand and the seal of said District Court, this 15th day of September, 1915.

[Seal]

W. B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed September 15, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

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*In the District Court of the United States, for the Northern District of California, Second Division.*

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,

Defendant.

**Engrossed Bill of Exceptions.**

BE IT REMEMBERED: That on the 14th and 15th days of September, 1915, the above-entitled cause came on for trial before the Court and a jury duly empaneled.

The Honorable WILLIAM C. VAN FLEET, presiding.

The plaintiff appearing by John S. Partridge, Esq., of the firm of Mastick & Partridge, as counsel

for plaintiff; and defendant appearing by Edgar C. Chapman, Esq., and William P. Hubbard, Esq., as counsel for defendant. Thereupon the following proceedings were had:

It was stipulated and agreed that the plaintiff, Bank of Bandon, was at all the times mentioned in the complaint and is a banking corporation incorporated under the laws of the State of Oregon, with its principal place of business at Bandon, Oregon; and that the defendant, the American National Bank, was at all the times mentioned in the complaint a national banking corporation with its principal place of business in the city and county of San Francisco, in the Northern District of California.

**[Testimony of J. L. Kronenberg, for Plaintiff.]**

J. L. KRONENBERG, a witness called and sworn on behalf of the plaintiff, testified in substance as follows: [24]

Just at the present time I am residing in Marin County, but my home is in Bandon, Oregon. I am, and ever since the plaintiff bank was incorporated ten or eleven yearsago, have been president of that corporation.

I know a company or corporation known as the Alfred Johnson Lumber Company. They did business at or near Bandon, Oregon. Their business was manufacturing lumber. For some time prior to the 15th of December, 1913, the plaintiff, Bank of Bandon, had business dealings with the Alfred Johnson Lumber Company. I could not state just the length of time prior to that, but I would say approximately



(Testimony of J. L. Kronenberg.)

two years prior. The Alfred Johnson Lumber Company were customers of the Bank of Bandon, and at regular intervals they discounted drafts on the Robert Dollar Company of San Francisco. Their regular pay-roll draft was once a month, on the 15th. We forwarded the drafts to the American National Bank for collection—presentation and acceptance, rather, and collection when due. We always did that during that time. Our understanding with the defendant, American National Bank, was that any item over \$500 they would wire nonacceptance, in the event that any draft was refused payment. The defendant was the only correspondent that the Bank of Bandon had at that time in San Francisco. That understanding was arrived at by letter I believe. I remember the plaintiff having received a draft from the Alfred Johnson Lumber Company on the 15th day of December, 1913. The paper you are now showing me is that draft.

The plaintiff offered the said draft referred to, and the same was admitted in evidence and marked "Plaintiff's Exhibit No. 1," and is in the words and figures following:

**[Plaintiff's Exhibit 1—Draft December 15, 1913.]**

\$6,000.00

Bandon, Ore., Dec. 15, 1913.

At sixty days sight, Pay to the order of Bank of Bandon, Bandon, Ore., Six Thousand & No/100 Dol-

(Testimony of J. L. Kronenberg.)

lars, Value received and charge the same to account of [25]

ALFRED JOHNSON LUMBER CO.

S. P. BARTLETT,

Treas.

To the Robert Dollar Co.

160 California St. San Francisco, Cal.

No. 97                      22074.

There was written on the face of the draft, in red ink, the following: "Accepted Dec. 21, 1913. Date Payable Feby. 19, 1914," with a rubber stamp, but no signature to the acceptance. In red ink is written: "Protested for nonpayment this 30th day of Dec., A. D. 1913. Charles Edelman, Notary Public." On the back of the draft appears the following: "Pay to the Order of The American National Bank 11-24 San Francisco, Cal. All previous endorsements guaranteed. Bank of Bandon 96-88 Bandon, Oregon. F. J. Fahey, Cashier." Also on the back of the draft is written: "Don't care to accept it. H. M. Lorber." And also the following, written in ink: "Advised acceptance 12-19-13."

WITNESS.—(Continuing.) As soon as that draft was discounted we proceeded to pay on it. I think that the money was used by the Alfred Johnson Lumber Company almost entirely for pay-roll. That draft was forwarded to San Francisco to the American National Bank. The first information that I had from the American National Bank concerning that draft was a mail advice to the effect that the

(Testimony of J. L. Kronenberg.)

draft had been accepted. The paper that you are now showing me is the advice to which I refer.

The plaintiff offered the same, and it was admitted in evidence and marked "Plaintiff's Exhibit No. 2," and is in the words and figures following:

**[Plaintiff's Exhibit No. 2—Advice Reacceptance of Draft.]**

"The American National Bank of San Francisco.  
San Francisco, Cal., 12-19-13.

Bank of Bandon, Ore.

We enter for collection the following:

Your Date 12-15 Robert Dollar, 6,000. Accepted.  
Payable 2-17-14." [26]

WITNESS.—(Continuing.) After we got the notice on the 19th of December notifying us that the draft was accepted, we heard from it again on the 29th of December by wire. The paper which you are now showing me is the telegram which we received, and the other paper which you are showing me is the letter which we received, sent the same day, and containing a translation of the telegram.

Here the plaintiff offered the said telegram, and the same was admitted in evidence and marked "Plaintiff's Exhibit No. 3," and the same is in the words and figures following:

**[Plaintiff's Exhibit No. 3—Telegram, American National Bank to Bank of Bandon.]**

COOS BAY HOME TELEPHONE CO.

Telegram.

Recording Opr. Number. Time Filed. Check.

1-3

3.59 P. M. 22 Pd. Via Mfed.

BANK OF BANDON, Bandon.

Zabbies item dollar jabbering yours fifteenth acceptance advised in error by us quabbeln unless otherwise advised by wire will return without protest.

AMERICAN NATIONAL BANK.

Reed. 12/29/13.

Ans. 12/29/13.

The plaintiff offered the said letter referred to by the witness, and the same was admitted in evidence and marked "Plaintiff's Exhibit No. 4," and is in the words and figures following:

**[Plaintiff's Exhibit No. 4—Letter, December 29, 1913, D. B. Fuller, Cashier to Bank of Bandon.]**

The American National Bank of San Francisco.

San Francisco, December 29, 1913.

Bank of Bandon, Bandon, Ore.

Dear Sirs: We telegraphed you this day as follows:

"Item Dollar \$6000 yours fifteenth, acceptance advised in error by us. Acceptance refused. Unless otherwise advised by wire will return without pro-



(Testimony of J. L. Kronenberg.)

test." Which we now confirm.

Yours respectfully,

D. B. FULLER,

Cashier.

Received Jan. 2, 1914. [27]

WITNESS.—(Continuing.) The paper which you hand me is a night letter of the same date, which was sent by the Bank of Bandon to the American National Bank.

The plaintiff offered the same, and it was admitted in evidence and marked "Plaintiff's Exhibit No. 5," and is in the words and figures following:

**[Plaintiff's Exhibit No. 5—Night Letter, December 29, 1913, Bank of Bandon to American National Bank.]**

Bandon, Ore., Dec. 29, 1913.

American National Bank,

San Francisco, Cal.

Answering your wire today cannot accept return of Dollar item, for we have paid out on your notice of acceptance nineteenth and for that your correction wired of twenty-ninth came too late for us to protect ourselves, and out of due course would suggest you see about it personally as they may now accept and if not would suggest protest; they should have cargo there now to cover item.

BANK of BANDON,

4.15 A. M.

WITNESS.—(Continuing.) It is a fact that the Bank of Bandon had paid out some money on the

(Testimony of J. L. Kronenberg.)

draft. I could not say positively whether that was prior to the 29th that we paid out all the money on the draft; the books will show. During the time between the 19th of December, the date when the draft was refused by the Robert Dollar Company, and the 29th of December, the day when we were notified by the American National Bank that it had been refused, there was property in Bandon by which the Bank of Bandon could have protected itself. It consisted of a cargo of Port Orford cedar, or white cedar. I could not say when that cedar was put on the dock, but it was previous to the 15th of December. The vessel started loading about the 21st of December, 1913, and sailed on the 24th of December, 1913. The name of the vessel was the "Grace Dollar" and she was bound for San Francisco. The value of that cargo of cedar was approximately \$10,000 to \$12,000. [28]

Plaintiff thereupon offered the protest of said draft, and the same was admitted in evidence, marked "Plaintiff's Exhibit No. 6," and is in the words and figures following:

**[Plaintiff's Exhibit No. 6—Protest.]**

UNITED STATES OF AMERICA.

State of California,

City and County of San Francisco,—ss.

On the 30th day of December, in the year of our Lord one thousand nine hundred and thirteen, at the request of The American National Bank of San Francisco, Cal., holder of the Draft hereinafter set forth, I, Charles Edelman, Notary Public, duly com-

missioned and sworn, dwelling in the City and County of San Francisco, did, during business hours of said day, present the original Draft (a copy of which is endorsed on the reverse of this sheet) at the office of The Robert Dollar Co., the drawee thereof, in this City and Co., and demanded acceptance of same of H. M. Lorber, Esq., the Secty. of said Company, which he refused, saying: "Do not care to accept it."

Whereupon I, the said Notary, at the request aforesaid, did Protest, and by these Presents do publicly Protest, as well *as* against the Drawer and Endorsers as against all others whom it doth or may concern, for Exchange, Re-exchange, and all Costs, Damages and Interests, already incurred or to be hereafter incurred for the non-acceptance of the said Draft.

I do Hereby Certify, That on the 30th day of December, A. D. 1913, notice of Protest, Demand and non-acceptance of the above mentioned Draft was served upon the drawer and endorser by depositing the same in the United States Postoffice in this City, postage fully prepaid thereon, directed as follows:

Alfred Johnson Lumber Co.,

S. P. Bartlett, Treas. (Drawer.)

Bandon, Oregon.

Bank of Bandon. (Endorser.)

Bandon, Oregon. [29]

such being the reputed places of residence of said respective parties and the postoffices nearest thereto according to the best information I could obtain.

(Testimony of J. L. Kronenberg.)

Thus Done and Protested, in the City and County of San Francisco aforesaid the days and year above written.

[Seal] CHARLES EDELMAN,  
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires April 9th, 1914."

Endorsed: \$6000.00.

Bandon, Ore. Dec. 15, 1913.

At sixty days sight Pay to the order of Bank of Bandon, Ore., Six Thousand & no/100 Dollars, Value received, and charge the same to account of,

ALFRED JOHNSON LUMBER CO.

S. P. BARTLETT,

Treas.

To The Robert Dollar Co.

160 California St., San Francisco, Cal.

No. 97. 22074.

Endorsed:

"Pay to the Order of The American National Bank. 11-24 San Francisco, Cal. 11-24.

All previous endorsements guaranteed. BANK of BANDON, 96-88 Bandon, Oregon, 96-88.

F. J. FAHY,

Cashier."

WITNESS.—(Continuing.) I know George P. Topping. He is and has been attorney for the Bank of Bandon, and at the time the bank received this notification from the American National Bank with regard to the refusal of this draft I consulted Mr.



(Testimony of J. L. Kronenberg.)

Topping and authorized him to wire to the American National Bank.

Plaintiff offered telegram from George P. Topping to American National Bank, and the same was admitted in evidence, marked Plaintiff's Exhibit No. 7, and the same is as follows: [30]

**[Plaintiff's Exhibit No. 7—Telegram, December 30, 1913, George P. Topping to American National Bank.]**

Bandon, Ore., Dec. 30, 1913.

American National Bank, San Francisco, Cal.

Bank of Bandon refers your wire thirtieth to me for you in reference to Dollar item as they understand you wish some action taken here; they have no lien on any shipment or cargo; about five hundred thousand at mill; cannot hold except by attachment; await your advice, letter following.

GEORGE P. TOPPING.

WITNESS.—(Continuing.) The paper which you now show me is a telegram from the Bank of Bandon received from the American National Bank.

Plaintiff offered said telegram, and the same was admitted in evidence and marked Plaintiff's Exhibit No. 8, and the same is in the words and figures following:

(Testimony of J. L. Kronenberg.)

**[Plaintiff's Exhibit No. 8—Telegram, 12/30/13,  
American National Bank to Bank of Bandon.]**

San Francisco, 12-30-13.

Bank of Bandon,  
Bandon.

Dollar Company advises no cargo to cover if you have lien on any particular shipment. Take immediate legal option to prevent delivery, as drawers of draft have been placed in involuntary bankruptcy by Dollar. If you cannot gain possession of cargo, file claim with receiver and send us copy of proof of claims.

AMERICAN NATIONAL BANK.

WITNESS.—(Continuing.) The Bank of Bandon received the wire which you are now showing me from the American National Bank.

Plaintiff offered the same, and it was admitted in evidence, marked Plaintiff's Exhibit No. 9, and is in the words and figures following:

**[Plaintiff's Exhibit No. 9—Telegram, 12/31/13,  
American National Bank to Bank of Bandon.]**

San Francisco, 12-31-13.

Bank of Bandon,  
Bandon.

We have telegram from Geo. P. Topping whom we do not know. We decline to deal with him direct at this time, expect you to [31] take any and all legal steps to protect all parties concerned and await full statement from you as to when and how advance

(Testimony of J. L. Kronenberg.)

was made to Johnson Company.

AMERICAN NATIONAL BANK.

Received January 2, 1914.

WITNESS.—(Continuing.) The letter which you are now showing me was received by the Bank of Bandon from the American National Bank.

Plaintiff offered the said letter, and the same was admitted in evidence and marked "Plaintiff's Exhibit 10," and is in the words and figures following:

**[Plaintiff's Exhibit No. 10—Letter, December 31, 1913, D. B. Fuller, Cashier, to Bank of Bandon.]**

THE AMERICAN NATIONAL BANK of San Francisco.

Dec. 31, 1913.

Registered.

Bank of Bandon, Bandon, Oregon.

Gentlemen: Referring to interchange of telegrams regarding the Alfred Johnson Lumber Co. draft, which we, in error, advised you as having been accepted, we enclose the same herewith, duly protested, believing that the documents can be handled to better advantage by you than by us.

This morning we received the following Night Letter from Mr. Geo. P. Topping:

"American National Bank, San Francisco, Cal.

Bank of Bandon refers your wire thirtieth to me for you in reference to Dollar item as they understand you wish some action taken here. They have no lien on any shipment or cargo, about five hundred thousand at mill. Cannot hold except by attach-

ment. Await your advice. Letter following."

To which we replied as follows:

"Bank of Bandon, Bandon, Ore.

We have telegram from Geo. P. Topping whom we do not [32] know. We decline to deal with him direct at this time. Expect you to take any and all legal steps to protect all parties concerned and await full statement from you as to when and how advance was made to Johnson Company."

We take it that Mr. Topping's message was sent without consultation with you and with the main idea of fixing the responsibility on us. This was entirely unnecessary, as we never try to evade an issue. If we were the cause of your making a loss on the transaction, we will expect to suffer the penalty, but on the other hand if the draft was given to you in cover of an obligation already created, and if the delay in receiving notice of its non-payment in no way jeopardized your position, we will expect you to carry the burden.

We have learned through the Robert Dollar Company that the Alfred Johnson Company knew that their draft had not been accepted, and if they obtained an advance from you on the strength of such acceptance, they were perpetrating a fraud and there should be some way of holding the responsible parties criminally.

Awaiting your reply to our message of this morning and a full statement from you regarding the transaction, we remain,

Yours very truly,

D. B. FULLER,

Cashier.



(Testimony of J. L. Kronenberg.)

WITNESS.—(Continuing.) The paper which you are now showing me is a letter by the Bank of Bandon to the American National Bank.

Plaintiff offered the said letter, and it was admitted in evidence and marked Plaintiff's Exhibit No. 11, and is in the words and figures following:

**[Plaintiff's Exhibit No. 11—Letter, January 6, 1914,  
Bank of Bandon to American National Bank.]**

Jan. 6, 1914.

American National Bank, San Francisco, Calif.

[33]

Gentlemen: Referring to your letter of December 31st, in reference to Alfred Johnson Lumber Company draft, on Robert Dollar Company for \$6,000.00, beg to reply as follows:

The message from Mr. Topping, received by you December 31st and referred to in yours of that date, was worded by Mr. Topping, being worded and sent by him after consultation with our Mr. Fahy, and arose out of our construction or understanding of your telegram of December 30th.

First, we received yours of December 19th advising acceptance of draft. The next advice we had on that item was your message of December 29th which we understand to read as follows:

"Item Dollar \$6,000 yours fifteenth, acceptance advised in error by us. Acceptance refused, unless otherwise advised by wire, will return without protest.

AMERICAN NATIONAL BANK."

To this message we wired you the following answer:

“Bandon, Ore., Dec. 29, 1913.

American National Bank, San Francisco, Calif.

Answering your wire to-day, cannot accept return of Dollar item for we have paid out on your notice of acceptance December 19th, and for that your correction wire of 29th came too late for us to protect ourselves and out of due course would suggest you see Dollar personally, as they may now accept, if not would suggest protest. They should have cargo there now to cover item.

BANK OF BANDON.”

In answer to last above message, we received from you the following wire:

“San Francisco, 12-30-13.

Bank of Bandon, Bandon. [34]

“Dollar Company advises no cargo to cover, if you have lien on any particular shipment take immediate legal action to prevent delivery, as drawers of draft have been placed in involuntary bankruptcy by Dollar. If you cannot gain possession of cargo file claim with receiver and send us copy of proof of claims.

“AMERICAN NATIONAL BANK.”

On receipt of last above-mentioned message we construed the same as directory instructions, and as the points raised in your message 12-30-13 raises legal questions we submitted the matter to Mr. Topping for his action, as we understood it, on your behalf. Mr. Topping advises us that he at once wired you as follows—after consultation with our Mr.

Fahy—and wrote you at the same time, to wit:  
“Message.                      Bandon, Ore., Dec. 30, 1913.

Bank of Bandon refers your wire 30th to me for you in reference Dollar item, as they understand you wish some action taken here. They have no lien on any shipment or cargo, about 500,000 at mill, cannot hold except by attachment. Await your advice, letter following.

GEO. P. TOPPING.”

To which we received the following reply from you:

“San Francisco, 12-31-13.

Bank of Bandon, Bandon.

We have telegram from Geo. P. Topping whom we do not know. We decline to deal with him direct at this time expect you to take any and all legal steps to protect all parties concerned and await full statement from you as to when and how advance was made to Johnson Company.

AMERICAN NATIONAL BANK.”

Now, yours of December 31st confirms the last two messages and our letter of January 3d and the one of to-day [35] we think confirms or recites all others and we trust correctly and as sent. This brings us again up to the last part of your letter of December 31st, page 2.

Mr. Topping's message of December 30th in answer to yours of December 30th was, as we have said, worded and sent by him after consultation with our Mr. Fahy, and with the understanding on our part and on the part of Mr. Topping on the interpretation

of your message of the 30th, that you wished some action taken on your behalf.

In further consideration of your letter, will state that the draft was not given to us to cover an obligation already created, but as stated in ours of January 3d and was a pay-roll draft. We in turn wish to say that we do not wish you people to feel that we desire in any way to shift any responsibility legally belonging to us.

In reference to the matter of the Alfred Johnson Lumber Company knowing that their draft had not been accepted and as to the question of fraud on their part or on the responsible parties, will say that we will investigate this phase of the situation, and in conclusions, and in consideration of all the correspondence will say that we are watching the matter closely and are endeavoring to protect the interest of both yourselves and our own in any way we can.

We find that there is a cargo of Fir on the mill docks as we have previously advised you, and that the 'Grace Dollar' is about to load this cargo, but we have concluded that it is not advisable to attach or try to hold the same, as the expense of taking same off of the mill wharf would consume too great a portion of its value, as it is not a very valuable cargo and to attach it and leave it on the wharf would leave the labor liens for December all against it,  
[36]

We will, however, endeavor to keep a close watch and will keep you advised of any particulars desired by you.

Yours truly."



(Testimony of J. L. Kronenberg.)

WITNESS.—(Continuing.) The paper which you are now showing me is a letter which the Bank of Bandon received from the American National Bank.

Plaintiff offered the said letter, which was admitted in evidence and marked Plaintiff's Exhibit 12, and the same is in the words and figures following:

**[Plaintiff's Exhibit No. 12—Letter, January 6, 1914,**

**D. B. Fuller, Cashier, to Bank of Bandon.]**

THE AMERICAN NATIONAL BANK OF SAN  
FRANCISCO.

January 6, 1914.

Bank of Bandon, Bandon, Oregon.

Gentlemen: Since writing you on December 31st, we are in receipt of your favor of December 29th, and a letter from Mr. Topping dated December 30th.

We are advised by the Robert Dollar Company this morning that Mr. Stanley Dollar should reach your city to-day. It is the intention of the Dollar Company, if they can gain the consent of all parties concerned, to have the affairs of the Johnson Company turned over to them as Trustee, to avoid the appointment of a Receiver; this to be done for the reason that their attorney's estimate of the cost of Receiver proceedings was about \$15,000.

We have great confidence in Mr. Dollar and his ability to pull the Johnson Company through, and are of the belief that all creditors should join in the appointment of a Trustee. If any attachments have already been levied they would be of no avail if the Company were forced into bankruptcy, and if not

(Testimony of J. L. Kronenberg.)

released to the Trustee would result in bankruptcy proceedings to the detriment of all concerned.

We expect to hear from the Dollar Company to-day or [37] to-morrow as to what action Mr. Stanley Dollar will take. If we deem it advisable, will wire you on the subject.

Very truly yours,

D. B. FULLER,

Cashier.

Received Jan. 9, 1914.

WITNESS.—(Continuing.) After the Bank of Bandon received the wire of December 29th advising that the draft had been refused, there was no property of the Alfred Johnson Lumber Company that I know of which the Bank of Bandon could have attached or by which it could have protected itself.

The COURT.—Q. Did you have the situation looked into by your counsel? A. We did.

The COURT.—Q. Did he report to you that there was no available property on hand to respond to this demand? A. Yes, sir.

Cross-examination.

I could not say positively how long the Alfred Johnson Lumber Company had been dealing with the bank on the 15th of December, 1913; one or two years, I think. This draft was first deposited with the Bank of Bandon on the 15th of December, I think. At that time the Alfred Johnson Lumber Company had a commercial account with the Bank of Bandon. I could not state to you the status of that

(Testimony of J. L. Kronenberg.)

commercial deposit account of the Johnson Lumber Company on the 15th of December. We have here the ledger sheets, I believe, which would show that. The bookkeeper is here who kept the ledger at that time. I think that the Bank of Bandon on the 15th of December held paper of the Alfred Johnson Lumber Company other than this draft. I could not state the amount. The bookkeeper here can possibly answer that question. The books will show when the amount of this draft was credited by the Bank of Bandon to the account of the Alfred Johnson Lumber Company. I could. [38] not say positively aside from the books, but I think it was on the 15th.

The first knowledge the Bank of Bandon had from the American National Bank that the draft had not been accepted was on the 29th of December. I could not say positively the amount of money which was advanced by the Bank of Bandon to the Alfred Johnson Lumber Company in the interim between the 15th of December and the 29th of December. I could not say positively what property the Alfred Johnson Lumber Company had at Bandon from the 15th of December, 1913, until January 6th, 1914. They were in the lumber business. They owned a lumber mill and were operating logging camps. They were manufacturing approximately from 80,000 to 90,000 feet of lumber per day, I think. They had a mill that would cut about 80,000 feet. I could not say positively the value of the plant. I do not know whether or not there was at the yard of the mill or anywhere around about there lumber from Decem-

(Testimony of J. L. Kronenberg.)

ber 15th until January 5th or 6th. I could only answer approximately as to the quantity of lumber there was; I suppose 700,000 or 800,000 feet between the 15th and the 29th of December. I should judge the value of that was \$10,000 to \$12,000. It left there—at least the vessel sailed on the 24th of December, carrying this cargo. That was the white cedar. After the 24th of December, there was probably 500,000 feet of lumber there at the mill. The value of that would be a little more *than pay* the freight to San Francisco; that would be \$4 or \$5 a thousand. Aside from this the Alfred Johnson Lumber Company had the mill. I guess the value of that was not very much, subject to the mortgage against it. The mortgage was approximately \$10,000. The value of the mill, I could not say, and I have no idea. I could not say whether the Alfred Johnson Lumber Company had [39] any other property than that.

The face of the draft was credited to the Alfred Johnson Lumber Company before the Bank of Bandon had received any information of any kind from the American National Bank. I could not give you the exact amount of that \$6,000 which had been credited to the Alfred Johnson Lumber Company on that draft which was paid out or disbursed in the interim between December 15th and December 29th, 1913, but I think approximately \$4,500 or \$5,000. I think there are books here of the Bank of Bandon which will show that, and they are in custody of an officer of that Bank in Court. After the 29th of December,



(Testimony of J. L. Kronenberg.)

1913, our bank did not attempt to levy on any property.

The COURT.—Q. What did you do? Did you put the matter into the hands of your counsel?

A. We put the matter in our attorney's hands.

WITNESS—(Continuing.) The attorney examined into the matter and concluded there was nothing to attach. He arrived at that conclusion by personal search.

Some time prior to the deposit of that draft in the Bank of Bandon, we had a statement of the general affairs of the Alfred Johnson Lumber Company. I could not tell the exact date; it was within sixty days, though, I would think, of December 15th. I could not tell you in a general way what that statement showed as to the Alfred Johnson Company's financial standing. I think it showed they were solvent. I do not know how much it showed its assets exceeded its liabilities at that time. I did say that the Bank of Bandon had some other paper of the Alfred Johnson Lumber Company at that time. The Bank of Bandon had no collateral security from the Alfred Johnson Lumber Company for that paper. [40]

The COURT.—Q. Did any of the items covered by that additional paper enter into this amount that you charged against this draft?

A. No, sir; they were drafts of a similar nature drawn previous to that time.

Q. And upon which some balances remained?

A. They had probably been checked out or mostly

(Testimony of J. L. Kronenberg.)

so, but there were some drafts drawn previous to the 15th of December that were with the American National Bank, accepted, but not yet paid.

COUNSEL FOR PLAINTIFF.—Q. Subsequently paid?

A. Yes, sir. All that had been accepted were promptly paid when due.

The WITNESS.—(Continuing—Under Cross-examination.) Neither the Bank of Bandon nor myself had any knowledge or information as to how much the Alfred Johnson Lumber Company were indebted to the Robert Dollar Company between December 15th and December 29th, 1913. We thought likely they were indebted to some extent to the Robert Dollar Company. The thing that gave us that information was in the due course of business; it is a general rule that the lumber agents provide funds for the mill's operation.

The COURT.—Q. Was the Dollar Company the lumber agents of the Johnson Company?

A. Yes, sir.

The WITNESS.—(Continuing—Under Cross-examination.) I could not say that this financial statement which I saw about six days prior to December 15th, showing the state of affairs of the Johnson Company, showed that at that time they were indebted to the Robert Dollar Company in the sum of \$100,000 or a little more. I don't recollect any figures in [41] that connection. I could not say approximately or in a general way.

(Testimony of J. L. Kronenberg.)

The COURT.—What is the materiality of that?

Mr. HUBBARD.—No inference could be drawn from the fact that they simply drew on the Dollar Company that that draft would be accepted, and therefore they were not entitled to extend any credit upon any draft at that time, thinking that it would be accepted.

The COURT.—That would depend upon the course of business. If, during the existence of a situation of that kind for a considerable period, the drafts nevertheless were regularly accepted, they would have a right to rely upon that, unless they had some information to the contrary. I simply wanted to get at the materiality of the inquiry.

Mr. HUBBARD.—The materiality of it was to show that the Dollar Company at that time was a large creditor of this Johnson Company, and that the bank was not in any position to assume that that particular draft for some \$6,000 would be accepted by the Dollar Company when the Dollar Company was then a creditor in the amount of some \$100,000.

WITNESS.—(Continuing.) I did say this morning that the credit was made on the 15th of the amount of this draft to the Johnson Company, and also that the bank would have attached and could have protected itself by attaching this cargo of cedar during the interim between the 15th and the 29th of December, 1913, had the bank known that the draft had not been accepted. I certainly would have attached between December 15th and December 29th

(Testimony of J. L. Kronenberg.)

had I known that the draft was not going to be accepted, in order to protect ourselves. I could not say whether the Johnson Company at that time was in condition to have paid the Bank of Bandon aside from this [42] cargo of lumber. We would have attached to protect the draft, of course. We had no way of knowing what the assets of the Johnson Lumber Company were, and we would have immediately attached, had *it* known that the draft was not going to be accepted. We did not know at that time, or at all times, that even had we attached that cargo or any other property of the Alfred Johnson Lumber Company that it would have been a needless and futile act, or that it would have plunged the Alfred Johnson Lumber Company into bankruptcy. We considered that it was solvent, and, believing that it was solvent, I certainly would have attached that cargo had I known that the draft was not going to be accepted. Regardless of whether I knew it was solvent or insolvent, if I had known that draft was not going to be paid, I, as a banker, having done business with this customer for some years, would have attached that cargo.

I have not the letter which I referred to in my direct examination as to the custom between the defendant and the plaintiff. That letter is supposed to be in the Bank of Bandon; it is not here, and I have no copy of it.

The COURT.—A custom is not established by writing; a custom is established by the usual and



(Testimony of J. L. Kronenberg.)

ordinary course of business prevailing between parties.

Mr. HUBBARD.—The letter would be the beginning of that, your Honor.

The COURT.—No, a letter need not be the beginning of a custom; a letter might suggest that they would abide by a certain course of dealing, and then that is a contract that is assented to. A custom is an entirely different thing, not dependent upon writing at all.

Mr. HUBBARD.—We understand that, your Honor, as a rule of law. [43]

Redirect Examination.

When I testified in my cross-examination as to whether or not the Bank of Bandon held any other paper of the Alfred Johnson Lumber Company, I referred to similar drafts drawn previous to the draft in question. These drafts had all been accepted by the Robert Dollar Company, and the plaintiff had been so notified by the defendant. Those drafts were promptly paid when due, and the plaintiff did not hold any paper of the Alfred Johnson Lumber Company except those drafts which had been accepted by the Robert Dollar Company.

**[Testimony of L. E. Gallier, for Plaintiff.]**

L. E. GALLIER, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

I reside at Bandon, Oregon. I am bookkeeper in the Bank of Bandon, and have been such for about

(Testimony of L. E. Gallier.)

two years. One of these books I have is the cash-book sheet; the other is a general ledger sheet, and these other two are individual ledger pages—the account of the Alfred Johnson Lumber Company with the Bank of Bandon. These are the original sheets taken from the loose ledger, journal and cash-book. These books are mostly kept by me.

The same were then offered by the plaintiff and were admitted in evidence and marked Plaintiff's Exhibit No. 13 and are in the words and figures following:

The portions of which said books used and referred to on the trial are as follows:

**[Plaintiff's Exhibit No. 13—Ledger Pages, of Account of Alfred Johnson Lumber Co., With Bank of Bandon.]**

Ledger sheet which shows the following:

Name, ALFRED JOHNSON LBR. CO.

Address, City.

1913.

Dec. 15.	Overdraft.....	175.02	
15.	Credit of .....		5905.00
	And the following checks: [44]		
15.	.....	253.07	
16.	.....	1890.70	
17.	.....	575.68	
17.	.....	288.87	
18.	.....	952.87	
19.	.....	326.17	

(Testimony of L. E. Gallier.)

20. ....	261.16
22. ....	237.15
23. ....	232.79
24. ....	268.10
26. ....	172.32
27. ....	46.00
27. ....	27.50
29. ....	3.15

WITNESS.—(Continuing.) Reading from these exhibits, it appears that on the 15th of December, 1913, there was credited by the Bank of Bandon to the Alfred Johnson Lumber Company \$5,905. The thing that caused that credit was the deposit of a sixty-day draft on the Robert Dollar Company written by the Alfred Johnson Lumber Company. The reason that the credit is shown as only \$5,905, when the draft was \$6,000, is that there was exchange and discount taken on the draft.

On the 15th of December, 1913, there was advanced by the Bank of Bandon to the Alfred Johnson Lumber Company upon that draft, \$253.07; on the 16th, \$1,890.07; on the 17th, \$575.68; and \$288.87; on the 18th, \$952.87; on the 19th, \$326.17; on the 20th, \$261.16; on the 22d, \$237.15; on the 23d, \$232.79; on the 24th, \$268.10; on the 26th, \$172.32; on the 27th, \$46.00, and \$27.50; on the 29th, \$3.15.

At the time of the receipt of this draft by the Bank of Bandon, December 15, 1913, there was an overdraft of \$175.02 in the account of the Alfred Johnson Lumber Company with the Bank of Bandon, and from the 15th to the 29th of December, 1913, there

(Testimony of L. E. Gallier.)

was paid out by the Bank of Bandon to the Alfred Johnson Lumber Company \$5,710.55. This last-mentioned sum does not include the overdraft.

Cross-examination.

When this draft of \$6,000 was deposited on the 15th of [45] December, 1913, with the Bank of Bandon, a credit was entered to the account of the Alfred Johnson Lumber Company of \$5,905.00, and the other \$95 of the draft was the amount of exchange and discount. The overdraft was \$175.02.

This ledger page of the account which I have before me of the Alfred Johnson Lumber Company with the Bank of Bandon does not show any other indebtedness than this commercial banking account.

There was no other indebtedness from the Alfred Johnson Lumber Company to the Bank of Bandon from the 15th to the 29th of December, 1913, than this \$175.02 overdraft that I know of. I think there were no notes of the Alfred Johnson Lumber Company held by the Bank of Bandon. I did not personally have any financial statement which had been handed to the Bank of Bandon by the Alfred Johnson Lumber Company about December 15, 1913, or sixty days prior to that time. Mr. Fahy or Mr. Kronenberg might have had; I have none such in my custody.

The amounts paid by the Bank of Bandon for the account of the Alfred Johnson Lumber Company between the 15th and 19th days of December, 1913, were as follows: On the 15th, \$253.07; on the 16th, \$1,890.70; on the 17th, \$575.68, and also \$288.87; on



(Testimony of L. E. Gallier.)

the 18th, \$952.87, and on the 19th, \$326.17. That makes a total of \$4,287.36; that is, from and including the 15th to and including the 19th of December, 1913.

**[Testimony of George P. Topping, for Plaintiff.]**

GEORGE P. TOPPING, called and sworn as a witness on behalf of the plaintiff, testified in substance as follows:

I reside at Bandon, Oregon. I am an attorney at law, and am and have been since the organization of the Bank of Bandon its attorney. I am the George P. Topping referred to in the telegrams and letters introduced in evidence here. [46]

When the telegram of the 29th of December, 1913, was received by the Bank of Bandon, informing that bank that this draft had been dishonored, the matter was at once referred to me by Mr. Fahy, the cashier, and a consultation followed, and Mr. Fahy and myself prepared the telegram which was sent in answer. In reference to investigating as to whether there was any property of the Alfred Johnson Lumber Company to attach, I proceeded at once to examine the county records to find the standing of the Alfred Johnson Lumber Company to see what their liabilities were and whether there were any liens against their property. I also made a special trip to investigate the condition of the available assets on the wharf, the mill—anything that I could find. The matter was left in my charge, and I immediately proceeded to satisfy myself as to whether there was anything we could recover. From that investigation I

(Testimony of George P. Topping.)

found that there were mortgage liens against their mill and property. I found one mortgage to Tom Rushbaker of approximately \$10,000 on the mill property. That is the only property that I found that they had which anything could be made out of by attachment; and I think a man by the name of Wheeler had some lien; I have forgotten, though, just what the particulars of that were and the nature of that and the amount, because, after satisfying myself as to the advisability of trying to protect ourselves that way, I did not charge my mind further with it. There was in the neighborhood of 500,000 feet of common fir or pine, and there were labor liens on some of that and there were other liens—labor was threatening at that time, by the 29th, to place other liens, and their time had not expired; so if they had filed their liens, they would have been prior to the attachment. Taking into consideration those prior liens and the transportation of the lumber, there would not have been enough left to justify getting out the papers. I am not prepared to give anything but a very approximate [47] opinion as to the value of the mill property. I am not much of a judge of mill property. As I said, the information I took as to its value at that time I put out of my mind, other business coming up for my consideration.

#### Cross-examination.

The Alfred Johnson Lumber Company had the only sawmill there. I did not estimate the number of acres, except as it is shown from the records. I

(Testimony of George P. Topping.)

can't recall now how many acres the records did show. My recollection is it covered all of the mill property and some land beside that. I should judge there is possibly between five and ten acres covered by the mill and the yards.

I cannot recall the date of the mortgage. It is not a mortgage executed in the interim between December 15th and December 29th, 1913. It was one quite a while prior to that. I could not give you the value of the property covered by that mortgage. I satisfied myself of this fact—that if we attached we would have to take up this mortgage lien; the bank would be investing in an unprofitable mill property. As to giving you an idea as to what I discovered as the value of that property which I say was mortgaged for approximately \$10,000, I would not give you more than \$20,000 for the whole thing. I think it was not worth over \$15,000 or \$20,000. With all the claims I found against it, I would not—I have no knowledge; I cannot give you an opinion as to its value.

As to my giving an opinion as to the advisability of attaching or not attaching, I gathered my information as to values from those who knew. I could not give you the figures of that information which I obtained, but I know that it was sufficient to satisfy myself that an attachment would be useless. I do think that property was worth \$15,000. I don't recall any other property [48] that I found belonging to the Alfred Johnson Lumber Company. I found no standing timber on any lands except equi-

(Testimony of George P. Topping.)

ties, which were not attachable. They had contracts, I think, for stumpage and things like that. My recollection is that they were not available. I could not say now why they were not available; it has been some time ago.

I did not know that this particular subject was coming up at all. I was the attorney for the bank all this time, and carried on a part of this correspondence with the defendant, American National Bank, under consultation with the other officers.

I cannot tell you of any other property that I found, not sufficient to swear to it. This other property that I spoke of was not acreage. It was the right to remove timber and pay stumpage on it—contracts for timber, if I remember right. I could not say how large an amount they were. I think Mr. Kronenberg could testify in regard to that; I think Mr. Kronenberg knows about that. I think at that time I did—that is approximately—get an estimate in dollars and cents as to the values of those equities. I would not want to swear to it approximately, because—it would be a rough guess. I satisfied myself it was not worth levying upon; it would be of no value, and we would derive nothing from it by attachment. Yes, I was the one that was delegated by this bank, the plaintiff, to investigate that feature of it. I cannot give you any idea in a general way either as to the value of those equities. Perhaps if I would explain, some of the information as to those values came from others who knew, and I think partly from Mr. Kronenberg, who knew something



(Testimony of George P. Topping.)

of the value, and consultations followed, in which we satisfied ourselves that an attachment would not avail anything. We did not take abstract figures in detail. I am sorry that I cannot give you the information. If I had known I was going to be called upon to testify, I certainly could have [49] done it. I do not recall that I did find any other properties than these equities. There were a number of items; my recollection is that the mill property was the most important. It has been some time ago, so long ago that I would not undertake to testify intelligently with any degree of reliability as to the property—kind of property or the amount.

I cannot give you the total amount of the acreage that I found that stood in the name of the Alfred Johnson Lumber Company at that time. The acreage would be the smallest consideration. It generally runs in lots of 100 or 160 acres. It would probably run not over 160 acres in parcels. I cannot give you the totals, nor any idea of the totals. I did not bring any information along with me. I would not be willing to swear as to how many of these parcels of 80 or 160 acres stood in the Alfred Johnson Lumber Company name; I can give you no approximation. It ran in 80 or 160 acre tracts. It is not land that belonged to the Alfred Johnson Lumber Company, as I recall it. It is land on which they had contracts; somebody else owned the land. They had contracts for the stumpage; they had no interest in it. That is no asset belonging to them, except as they take it iff. They had an equity in the stump-

(Testimony of George P. Topping.)

age upon that land, and I cannot tell the value of that in dollars and cents. There was no value in those equities that was attachable from the fact that it would require labor and much expense to put that timber in and make it available. It was not put in, and therefore not available. It might have been worth a million dollars, and yet it was not available so you could attach it. This 500,000 feet of common fir or pine lumber was on the mill dock. It ranged in value about \$5—\$4 or \$5 a thousand, as I recall it. That would be somewhere between \$2,000 and \$2,500 for that. That was not attached, because there was the labor that would have to come out of it. I could not give you those figures. They were figured [50] out at that time; I have those in my record, and the stumpage was to come out of it; the transportation would have to come out of it. If we had attached it, the labor could have put liens on it. I think the labor liens were practically enough to consume the value entirely, adding freight to it. You cannot turn that into money without shipping it to San Francisco to market. The liens of labor upon that 500,000 feet would come close enough to have practically consumed it. The claims of the men who cut that lumber at that time would, with other liens, have amounted to as much as the value of the lumber.

The COURT.—I do not see the value of this sort of examination.

Mr. HUBBARD.—Your honor, it is material, we consider, for this purpose: We contend that this company cannot recover against us if we can show either

(Testimony of George P. Topping.)

of two sets of facts—either that they could have protected themselves by other property which was attachable, and that the company was solvent; or, on the other hand, if they had attempted to attach this particular cargo which came down to San Francisco, and which they contend they could have attached if we had notified them before the 29th. If we could show that the Johnson Company was insolvent, so that the attachment would have been nugatory upon either of these two horns of the dilemma, there is no liability upon this defendant. This testimony at this time is important upon the first of these propositions, namely, if we could show by this witnesses—

The COURT.—I do not think you apprehend my suggestion. I said I did not see the value of the character of examination that you are indulging in, going over the same ground repeatedly with the witness, when he has shown you very clearly that he has not now in his mind these items that you are calling for. My experience as a practicing lawyer, as well as on the bench, is such as to show [51] me the perfect reasonableness of it is this, that he made an investigation at the time, at the instigation of his client, to ascertain whether or not there was a reasonable ground of expectation of realizing on this claim before an attachment was levied upon the property. Now, he made an investigation which satisfied himself at the time as an attorney that it would be futile, it would be fruitless; he has told you that repeatedly. Inasmuch as he has not retained in his mind since then the details of this, which he has told you time

(Testimony of George P. Topping.)

and time again, that is without having access again to the records in his office, the memoranda and its items that he took down at the time, assuming that he has ascertained them, what I am suggesting is that you will get nothing further by getting him to go over and repeat the same things that he has told you.

Mr. HUBBARD.—With all due respect to your Honor, we take the position that we are not precluded simply because the witness gets on the stand—

The COURT.—With all due respect, I limit the reasonable character of an examination, and I sit here for that purpose.

Mr. HUBBARD.—We understand that, your Honor, and we will, of course, submit to your ruling.

The COURT.—It is my practice to withhold the privilege of repeated questions of the same precise character to a witness that has shown in apparently good faith that he is not capable of answering. That is all my suggestion meant, that I did not see the value of the character of examination that was being indulged in. The subject matter of your examination I am not questioning the propriety of, that is, the object that you have in mind; but that is an entirely different question from repeatedly putting to a witness questions which he has already answered.

WITNESS.—(Continuing.) I do not know when these liens accrued on this particular cargo. I could



(Testimony of George P. Topping.)

not give the date, but they [52] were before—that is, they were available to the lien claimants at the time, before we could have made the attachment. In Oregon you have thirty days to file a labor lien of this nature, while the lumber is yet upon the dock. The man who furnishes the stumpage also has the same lien and loggers in the logging camp, also have the same lien, and they are prior to all other liens, attachments or otherwise, even though they have not asserted them, as long as they would file them within thirty days, and they would precede the attachment if the attachment I was levying was before the lien was filed—that is to protect the labor within that thirty days' grace. That cargo had not been on the dock very long, for less than thirty days, quite a little. I did not find any other property that was subject to attachment. I made a very thorough investigation, struggled very hard to grab something.

I do not know of anything that occurred between December 15th and December 29th, 1913, which brought about this condition of the Alfred Johnson Lumber Company. The refusal of the draft was the first revelation to us that anything was wrong at all. The Robert Dollar Company had refused them credit—I mean credit upon the draft. They refused to honor the paper, and that very materially affected their financial condition.

During this investigation which I made as to the financial status of the Alfred Johnson Lumber Company I found their condition about the condition of

(Testimony of George P. Topping.)

the average mill company, as near as I can recall. They had the usual amount of liabilities. The financial condition was very much the same as the average; they were simply running the mill upon the available timber that they had and turning it into money, and running the mill again on the money they got. I could not give an opinion as to its assets and liabilities without reference to a memorandum. I investigated to determine as to whether I should attach, from whether or not there was anything attachable. [53] The question of their financial condition would not enter into my investigation except as I discovered liens and claims prior to our right of attachment. I don't know whether it would have been nugatory or not to attach if in my investigation of the financial condition I ascertained that the Alfred Johnson Lumber Company was on the border of insolvency. I could not say as to that, nor do I think any other attorney ever could.

Q. You did not go into the question, then, as to whether if you had attached whether or not it would have been plunged into bankruptcy by other creditors?

A. That is a possibility, yes, at all times.

Q. This particular case, Mr. Topping, which we have discussed, was not that a possibility which confronted you?

Mr. PARTRIDGE.—If your Honor please, I object to that on the ground it is immaterial and incompetent, in that the defendant here cannot hide behind a mere possibility.

(Testimony of George P. Topping.)

The COURT.—That is a mere assumption, that because under the law a proceeding in bankruptcy supersedes attachments levied within a given time, that had the party been attacked and been thrown into bankruptcy, it would have avoided the attachment. It is argument rather than matter of examination. You can draw your deductions from the evidence; you can ask an instruction to the jury as to what the law would be, but it is not a proper subject matter to examine a witness upon.

Mr. HUBBARD.—Very well, your Honor.

The COURT.—Because it is asking him to state a conclusion.

Mr. HUBBARD.—That is all.

To which ruling of the Court the defendant duly excepted, and which ruling is herein designated as error No. 1. [54]

Redirect Examination.

My investigation proved that there were *not* claims of any importance against this cargo of white cedar which was brought away by the “Grace Dollar” on the 24th of December, 1913. This pay-roll draft had taken them up; the \$6,000 draft which was dishonored had taken them up.

[Testimony of J. L. Kronenberg, for Plaintiff  
(Recalled).]

J. L. KRONENBERG was recalled on behalf of the plaintiff and testified in substance as follows:

These stumpage contracts which the Alfred Johnson Lumber Company had were of very little, if any,

(Testimony of J. L. Kronenberg.)

value. They were stumpage contracts made three or four years ago when timber was more valuable than it was or is at this time, and it is a question whether a contract could be made for stumpage at that price. A stumpage contract is an agreement to pay a certain rate of stumpage for the timber taken from parties' lands—that is, they had a right to cut timber from other people's land and pay them a certain price per thousand, and the stumpage was paid upon the delivery of the logs at the mill.

The COURT.—Q. Were the contracts made at a rate of stumpage which would not produce values at this port by reason of the difference in prices among them?

A. That is a question whether they would be as valuable now as they were then.

The COURT.—Q. \$1 a thousand or \$1.25?

A. \$2.25 for fir and \$5 for white cedar.

The COURT.—Q. That is a very high rate of stumpage, isn't it?

A. Yes.

Mr. PARTRIDGE.—Q. You could get contracts for stumpage at less than that now?

A. I think so. [55]

#### Cross-examination.

Between December 15th and December 29th, 1913, I could not say positively whether I could get contracts for stumpage less than that, but I think you could get them just as cheap and probably cheaper.

Mr. HUBBARD.—Q. You say you placed no value



(Testimony of J. L. Kronenberg.)

upon those stumpage contracts?

A. I would not consider them of any attachable value.

The COURT.—That is what I understood the witness to mean—that is, value for attaching purposes because of the necessity of the labor required to make them available.

WITNESS.—(Continuing.) It would be a very hard question to answer as to whether I had any opinion or idea of my own as to the value of this property which was covered by this mortgage of \$10,000, for the reason that the mill is old and in very bad shape. It did possibly have a value above the \$10,000 mortgage. I could only give you my personal opinion as to how much above that mortgage; it might be \$2,000 to \$5,000 above. We knew nothing out of the ordinary happening between the 15th of December and the 29th of December, 1913, in the affairs of the Alfred Johnson Lumber Company that so altered its position that we would have attached had we known before the 29th that this draft was not going to be accepted.

Here the following proceedings were had:

Mr. PARTRIDGE.—Now, if your Honor please, I request permission to amend the complaint to conform to the proof. I find that the allegations of the complaint are to the effect that the \$4500 was paid out by the Bank of Bandon subsequent to the receipt of the notice. I want to amend to set up the true fact as shown by the evidence, to the effect that the

(Testimony of J. L. Kronenberg.)

money was paid out beginning on the 15th and the amount was paid up to the 19th, and the amount was paid afterwards. [56]

Mr. HUBBARD.—What about the second cause of action?

Mr. PARTRIDGE.—The second cause of action I have eliminated entirely by putting it all in one.

Mr. HUBBARD.—May we see your proposed amendment?

Mr. PARTRIDGE.—Yes. Any objection to that, Mr. Hubbard?

Mr. HUBBARD.—No objection, provided, of course, it may be considered—we have to prepare our answer now—that our general denial which is already on file may apply to this pleading as amended.

The COURT.—This is unverified?

Mr. PARTRIDGE.—Yes.

The COURT.—Your general answer may be regarded as applying to this.

**[Testimony of George P. Topping, for Plaintiff  
(Recalled).]**

GEORGE P. TOPPING, a witness on behalf of the plaintiff, was recalled by the plaintiff and testified in substance as follows:

The nature of those other claims or liens against the mill property were machinery contracts in addition to the mortgage; for instance, some of this machinery purchased by the Alfred Johnson Lumber Company was purchased under contract, in which

(Testimony of George P. Topping.)

they held no title until the machinery was paid for, and there were towage liens.

Cross-examination.

I mean that these machines were purchased by the Alfred Johnson Lumber Company on conditional sale contracts and never paid for. I am in the same condition as to those as I am in regard to the other matters as to knowing how much these amounted to, except that they ran into several thousand dollars. My recollection is that this mortgage did not cover these machines, because the Alfred Johnson Lumber Company had no title which they could hypothecate.

[57] The mortgage was in addition to that. A man by the name of Ashton had a towage claim, which I satisfied myself, which would be a lien prior to our attachment, for something like \$1,200. It is my understanding that this lien was upon this specific cargo of 500,000 feet. Of course these figures I could not give specifically.

Here the plaintiff rested.

**[Testimony of R. Stanley Dollar, for Defendant.]**

R. STANLEY DOLLAR, a witness called and sworn on behalf of the defendant, testified in substance as follows:

I reside in San Francisco. I am vice-president of the Robert Dollar Company, and have been such a good many years, and was such during December, 1913. The Robert Dollar Company has had dealings with the Alfred Johnson Lumber Company ever since the Alfred Johnson Lumber Company was

(Testimony of R. Stanley Dollar.)

formed, which was about two years ago.

Between December 15th and December 29th, 1913, there was a business transaction between the Alfred Johnson Lumber Company and the Robert Dollar Company. We were handling the output of the Alfred Johnson Lumber Company. We were advancing money to the Alfred Johnson Lumber Company up to that date.

Q. How did the affairs stand at that date—between those two dates, between December 15th and December 29th?

Objected to by the plaintiff as immaterial, irrelevant and incompetent, particularly incompetent in that a third party, that is the agent, the collecting agent bank, holding papers for collection cannot protect itself by taking refuge behind the fact that the drawee of a bill of exchange does not hold funds of the drawer.

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and which ruling is herein designated [58] as error No. 2.

WITNESS.—(Continuing.) Between December 15th and December 29th, 1913, the status of the financial affairs between the Robert Dollar Company and the Alfred Johnson Lumber Company was that it owed the Robert Dollar Company about \$97,000, for which there was no security. From about the 29th of December, 1913, up to about the middle of January, 1914, I had occasion to go minutely into the financial affairs of the Alfred Johnson Lumber Company. I went up to Bandon to look over their books



(Testimony of R. Stanley Dollar.)

to see how they stood. I was up at Bandon on that mission a month. During that month I went through the books of the Alfred Johnson Lumber Company to ascertain the status of the financial affairs of that company.

Q. Now, from that going through the books what did you ascertain as to the general financial status of the Alfred Johnson Lumber Company as to solvency or insolvency?

Objected to by the plaintiff as immaterial, irrelevant and incompetent and hearsay, not the best evidence, and calling for the conclusion of the witness.

Mr. HUBBARD.—As it appeared subsequent to the 15th day of December, 1913?

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and which is herein designated as error No. 3.

WITNESS.—(Continuing.) When I went to Bandon I examined the cash-book, the ledger, journal and the bank-book of the Alfred Johnson Lumber Company. Its ledger is now in court. This book which I now have is the ledger of the Alfred Johnson Lumber Company. That ledger runs from 1913. It covers the period from December 15th on through up to January 1st, 1914. That is the book that I made an examination of. From that book I ascertained that the Alfred Johnson Lumber Company was insolvent. [59]

Q. Mr. Dollar, what position in reference to the affairs of the Alfred Johnson Lumber Company

(Testimony of R. Stanley Dollar.)

would the Robert Dollar Company have taken had it known that this particular cargo of cedar had been attached or was about to be attached by the Bank of Bandon?

Objected to by the plaintiff as irrelevant and incompetent.

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 4.

The COURT.—What one would testify now in the light of circumstances that have since developed they would have done on a particular occasion is entirely too uncertain, because they might not have been governed by the same considerations at the time at all.

WITNESS.—(Continuing.) After my visit to Bandon and my investigation of the affairs of the Alfred Johnson Lumber Company, the Robert Dollar Company, toward protecting its claim, got a list of all the creditors of the Alfred Johnson Lumber Company and asked them to join in on a trust agreement so as to keep any one creditor or two or three creditors from interfering, to see if we could work the thing out of the hole. That was done. That arrangement is in force now.

Q. What was that arrangement?

Objected to by the plaintiff as not the best evidence.

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and

(Testimony of R. Stanley Dollar.)

which ruling is herein designated as error No. 5.

WITNESS.—(Continuing.) I was a party to the arrangement. It was reduced to writing. I have a copy of that trust agreement. [60]

Cross-examination.

Prior to the time that this draft of December 15th was presented to the Robert Dollar Company we had frequently cashed drafts from the Bank of Bandon given it by the Alfred Johnson Lumber Company. On this particular occasion we did not tell the Alfred Johnson Lumber Company to draw this draft and it would be honored.

That particular cargo of white cedar was sold here by our company; we got the money for it. I don't remember the date it arrived here; we have records showing all that. I could not say whether this cargo arrived here and was disposed of before the 29th of December, 1913. I think the boat sailed about the 24th from the mill, according to the testimony here, and it would take her about thirty-six hours to come down; so that she would be here to start to discharge on the 26th, and undoubtedly she would have been discharged, under ordinary conditions, on the 28th or 29th of the month. I don't remember when the cargo was sold here. Generally these cargoes are sold before they arrive. The money was credited by the Robert Dollar Company to the Alfred Johnson Lumber Company.

Redirect Examination.

That agreement about which I testified on my di-

(Testimony of R. Stanley Dollar.)

rect examination was signed by the Robert Dollar Company and signed by the other creditors of the Alfred Johnson Lumber Company. There are two agreements; that is, there are duplicate agreements, or rather a separate one was made for the creditors out of town and one for the creditors in town, but the wording of them was identical, covering the whole affairs of the Johnson Company, and every creditor signed it. I will send up the agreement as soon as I return to my office. [61]

**[Testimony of J. L. Kronenberg, for Defendant  
(Recalled).]**

J. L. KRONENBERG was recalled by the defendant and testified in substance as follows:

The agreement which you are showing me, purporting to be dated January 14th, 1914, between the Alfred Johnson Lumber Company on the one hand, and Robert Dollar, named as trustee, and other persons, companies and firms as creditors of the Alfred Johnson Lumber Company, has the signature on it of the Bank of Bandon and was executed by the Bank of Bandon.

Defendant offered the said instrument in evidence. The same was admitted, marked Defendant's Exhibit "A," and is in the words and figures following:

**[Defendant's Exhibit "A"—Agreement, January 14, 1914, Alfred Johnson Lumber Co. and Robert Dollar, etc.].**

1. THIS INDENTURE, made the 14th day of January, 1914, between Alfred Johnson Lumber Co.,



a corporation of Coquille, Oregon, hereinafter called the debtor, of the first part; and Robert Dollar of San Francisco, Calif., hereinafter called the trustee, of the second part; and the several persons, companies and firms whose names and seals are hereunder signed and affixed respectively, being creditors of the said debtor, and all other creditors of the said debtor acceding hereto, hereinafter called the creditors, of the third part, witnesseth:

2. Whereas the said debtor is indebted to the said creditors in the several sums set opposite to their respective names in the first schedule hereunder written;

3. And whereas the said debtor has agreed to make the assignment and enter into the covenants hereinafter contained, and the said creditors have agreed with the said debtor, and mutually each with the others, to accept these presents in satisfaction of their debts, and to execute the release hereinafter contained:

4. Now this indenture witnesseth that, in pursuance of the said agreements and in consideration of the premises, and [62] one dollar to it in hand paid, the receipt whereof is hereby acknowledged, the said debtor hereby conveys and assigns unto the said trustee, his heirs, executors, and administrators, all and singular the real and personal property, credits and effects of the said debtor to which it is beneficially entitled, whether in possession, reversion, remainder, or expectancy, except such parts thereof as are specified in the second schedule hereto.

5. To hold the same unto and to the use of the said trustee, his heirs, executors, and administrators, according to the respective nature and tenor thereof upon the trusts and subject to the provisions and agreements hereinafter declared concerning the same respectively.

6. And this indenture further witnesseth that, in pursuance of the said agreements, and in consideration of the premises, the said debtor hereby appoints the said trustee, or successor in interest or his attorney, for the purposes hereinafter expressed.

7. And the said debtor hereby ratifies and confirms and covenants with the said trustee that it will, if and when required by it, ratify and confirm whatsoever the said trustee shall do or purport to do by virtue of the said power. And the said debtor further covenants with the trustee that it will not, without the consent of the trustee, sell, dispose of, charge, or incumber the said premises hereinbefore subjected to such power, or any part thereof.

8. And it is hereby agreed and declared that the said trustee shall stand possessed of the hereditaments and premises hereinbefore conveyed upon trust at such time and in such manner as he shall think fit to call in, collect, compel payment of, and receive such parts of the said premises as are outstanding, and to sell and convert into money such parts thereof as do not consist [63] of money; and shall stand possessed of the net proceeds of sale (subject to the payment thereof of such sums, if any, as may be due to incumbrancers concurring in

such sales respectively), and of all other moneys which shall come to his hands under and by virtue of the trusts or powers herein contained.

9. Upon trust, in the first place, to pay and retain thereout all costs, charges, and expenses of or incidental to the negotiation, preparation, and execution of these presents, and of or to the carrying of the same into effect.

10. And, in the next place, to pay all claims which are by law entitled to be paid in full in priority to other debts in case of bankruptcy or insolvency by proceedings in court.

11. And to pay, divide, and distribute the residue of the said moneys ratably unto and among the said creditors in discharge of their said debts by such installments and at such times as the trustee shall think fit, and to pay the surplus, if any, to the said debtor.

12. Provided always, and it is expressly agreed and declared, that notwithstanding the said trust for sale hereinbefore contained, it shall be lawful for the trustee to postpone the sale and collection of any part of the said premises for such time as is consistent with reducing the same to money as soon as this can be wisely and prudently done.

13. And in the meantime, and until the said premises respectively shall have been called in, collected, sold, and converted into money as aforesaid, it shall be lawful for the trustee at his discretion to manage, employ, repair, and insure against damage or loss by fire or otherwise, at the cost of the trust estate, all or any part of the said premises.

14. And it shall be lawful for the trustee to carry on the business which the said debtor has hitherto carried on, and [64] for such last-mentioned purpose to make such advances out of the premises for the time being, subject to the trusts of these presents, as he shall think fit.

15. And it is hereby agreed and declared that the said creditors shall be entitled to receive dividends under these presents in respect of all debts due to them respectively which would have been provable in bankruptcy, and on the amounts for which they would have been so provable.

16. And this indenture further witnesseth that, in further pursuance of the said agreements, and in consideration of the premises, the said creditors respectively hereby release the said debtor from the said debts, and from all other debts, if any, owing from the said debtor to them respectively, in respect whereof they would be entitled to receive dividends under these presents, and from all actions, claims, and demands whatsoever (other than their respective rights under these presents) in respect thereof.

17. Provided always, and it is hereby agreed and declared, that these presents shall not in any way prejudice or affect the rights or remedies of the said creditors against any surety or sureties, or any person or persons other than the said debtor. Nor shall these presents in any wise prejudice or affect any security which any of the said creditors may have or claim for his debt. But, nevertheless, if such security shall be enforceable against the said



debtor or his effects, then and in that case such creditor (unless he shall consent to abandon his said security) shall be entitled to receive dividends hereunder upon so much only of the said secured debt as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof.

18. And it is also declared that the power of appointing [65] new trustees shall, for the purposes of these presents, be vested in the said creditors, representing in value more than a moiety of the debts ranking for dividend hereunder.

19. And the party of the first part hereby covenants with the said party of the second part from time to time and at all times when requested to execute and deliver all such instruments that said party of the second part shall deem necessary or require in order to carry in full effect the true intent and meaning of these presents, and does hereby constitute and appoint the party of the second part its attorney irrevocable and with power of substitution, authorizing him in the name of the party of the first part or otherwise, as the case may require, to do any and all acts, matters and things to carry into effect the true intent and meaning of these presents which the party of the first part might do if personally present.

20. Unless all creditors sign, the arrangement as proposed cannot be carried into effect and shall be considered null and void.

In Witness Whereof, the party of the first part has

caused these presents to be executed by E. E. Johnson, Vice-president, duly authorized thereto by resolution of its board of directors duly and regularly passed, and the said party of the second part has hereunto set his name, and the parties of the third part have hereunto set their names together with the amounts of their respective claims set opposite thereto this 14th day of January, A. D. 1914.

ALFRED JOHNSON LUMBER CO.

By E. E. JOHNSON,  
Vice-president.

Executed in the presence of us as witnesses for party of the first part.

A. J. SHERWOOD.

W. KUCHLER.

ROBERT DOLLAR,

By R. STANLEY DOLLAR,

His Attorney in Fact. [66]

Name of Creditor.	Amount of Claim.
The Robert Dollar Co.....	95,359.46
By R. Stanley Dollar, Vice-pres.	
First National Bank of Coquille.....	5,000.00
Farmers & Merchants' Bank of Coquille...	2,500.00
R. W. Beelard.....	493.84
Bandon Iron Works.....	1,394.01
T. P. Hanly.....	405.93
C. R. Gabeler .....	265.14
Bandon Market.....	395.15
Bank of Bandon.....	5,000.00
A. B. Daly & Co.....	217.28
Nelson Iron Works, by J. S. Lyons.....	334.84
Coquille Valley Creamery Co.....	450.60

Name of Creditor.	Amount of Claim.
McNair Hdw. Co.....	249.28
Bank of Bandon as their interest may ap- pear .....	6,000.00
C. W. Ashton .....	923.50
O. R. Willard, Pres. of C. R. T. Co.	
R. H. Most, Secty.                   “ “	
Coos Bay Home Tele. Co.	
By W. U. Douglas, Pres.....	168.80
Johnson Lumber Co., by E. E. Johnson Sec.....	13,930.42
Q. P. Bartlett.....	10,000.00
By S. P. Bartlett	
Maryland Casualty Co.	
By Rodgers Hart Gibson Co., Gl. Agts....	346.65
C. McC. Johnson, by E. E. J. (Except Jan. and Feb. Salary)	
Macomber & White	
Swift and Company	
The American National Bank of San Fran- cisco, by D. B. Fuller Cashier (As its in- terests may [67] appear a-c draft for \$6,000, referred to above by Bk. of Ban- don) .....	6,000.00
The Gutta Percha Rubber Mfg. Co., H. P. Martine, Mgr.....	248.46
T. P. Degan Belting Co., W. P. Beard.....	130.56
Sperry Flour Co., per W. P. Lugg.....	326.22
Berger and Caster Co., A. N. Hanson.....	542.49
Haas Brothers, Baueram.....	269.55
California Saw Works, H. Bird.....	173.50
American Marine Paint Co.....	122.88

Name of Creditor.	Amount of Claim.
Remington Typewriter Co., H. J. Hastings..	1.57
H. L. Judell & Co., H. L. J.....	6.00
Plant Rubber & Supply Co., E. H. Purie, Secy. ....	56.52
Mason Ehrman & Co.....	30.90
Feb. 9, 1912, W. P. Fuller, H. H. S.....	584.78
Dunham, Carrigan & Hayden Co., W. M. Lengisiler, Secy.....	17.50
Western Meat Co., G. J. Johst.....	21.15
Balfour Guthrie & Co.....	9.07
Simmons Manufacturing Co., Jno. M. Sears, Mgr.....	984.53
Albers Bros. Mill Co.....	23.16
G. W. Brainard	
Carson Glove Co.....	21.71
Davis Scott Belting Co.....	32.34
By G. W. Brainard	
The J. K. Gill Co.....	12.23
L. Dinkelspiel Co.....	33.93
Standard Oil Co.....	12.24
Neustadter Bros. ....	131.20
By H. L. Smith	
Tillmann & Bendel .....	22.40
Baker Valve Co.....	10.00
Pacific Lumber Inspection Bureau, Inc....	60.26
By Jno. W. Alexander, Secty. [68]	
Northwestern Mutual Fire Association	
M. D. L. Rhodes, Secy.....	75.00
The Timberman, by G. W. Brainard.....	40.00
HERE THE DEFENDANT RESTED.	



**[Testimony of Frank P. Doe, for Plaintiff (in Rebuttal).]**

FRANK P. DOE, a witness called by the plaintiff in rebuttal, was sworn and testified in substance as follows:

I reside in San Francisco. I know the Coquille Mill & Towboat Company. I am the president of that company, and also acting as San Francisco agent. That company owns timber lands in the neighborhood of Bandon, Oregon. It is a timber land which is included in the stumpage contract to the Alfred Johnson Lumber Company.

The book which you are now showing me is the cash-book of Frank P. Doe, in which we make entries of the actual payments. It is kept not entirely by myself. The item on the page opened here, the item of January 28, 1914, is in my handwriting.

Q. Now, Mr. Doe, refreshing your memory from that in your own handwriting, will you state whether or not you received any money from the Alfred Johnson Lumber Company on the 28th of January, 1914.

Objected to by the defendant as immaterial, irrelevant and incompetent.

The COURT.—The contention is here, as I understand on your part, they were insolvent and unable to pay their debts at that time.

Mr. HUBBARD.—That is in January, 1914.

The COURT.—That is after this transaction in suit, isn't it? [69]

(Testimony of Frank P. Doe.)

Mr. HUBBARD.—Yes.

The COURT.—What is the theory upon which you offer this?

Mr. PARTRIDGE.—On the theory that it tends to show that the Robert Dollar Company would not have thrown them into bankruptcy.

The COURT.—There is no evidence that they were thrown into bankruptcy.

Mr. PARTRIDGE.—No, but the theory of counsel, as I understand it and its sole and only defense, is that, although they made this mistake, it was of no difference, because if we had attached they would have thrown them into bankruptcy; I offer this as evidence tending to show they would not have done anything of the kind, and as a matter of fact they protected them up to the end of January.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 6.

A. Yes, we did.

Q. How much?

Objected to by the defendant as immaterial, irrelevant and incompetent.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 7.

A. \$269.40.

Q. What was that for?

Objected to by the defendant as incompetent, irrelevant and immaterial.

(Testimony of Frank P. Doe.)

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 8.

A. That was for logs sold prior to the first of January. [70]

WITNESS.—(Continuing.) That is stumpage, I mean.

Q. Now, then, in what way was that amount paid to you?

Objected to by the defendant as irrelevant, incompetent and immaterial.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 9.

A. By the Robert Dollar Company.

Q. By a draft on them from the Alfred Johnson Lumber Company, you mean?

Objected to by the defendant as irrelevant, incompetent and immaterial.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 10.

A. No. As I recollect, this amount was due, and they sent us out their check for it.

The COURT.—Q. Who sent you the check?

A. The Robert Dollar Company.

The COURT.—Q. But it was for the debt of the Alfred Johnson Lumber Company? A. Yes.

Cross-examination.

This payment was for logs or stumpage that was

(Testimony of Frank P. Doe.)

sold in November or December, 1913, as I recollect—October and November, I mean. As to when these logs were actually taken by the Alfred Johnson Lumber Company I only know from the entries made by our company at that time. As I recollect, it was October and November, 1913. Of course our company had a lien upon those specific logs by virtue of our contracts.

The COURT.—Q You had perhaps a right under the statute to a lien?

A. Yes. [71]

The COURT.—Q. Within a given time?

A. Yes. Mr. Kronenberg is the manager up there, and he managed that end, and he could tell you better than I.

[Testimony of S. P. Bartlett, for Plaintiff (in Rebuttal).]

S. P. BARTLETT, a witness called in rebuttal by the plaintiff, was duly sworn and testified in substance as follows:

I have been living about thirty miles east of Portland up to a couple of weeks ago. I was connected with the Alfred Johnson Lumber Company as secretary and treasurer, and was such in the month of December, 1913.

I don't remember any particular draft drawn by the Alfred Johnson Lumber Company on the Robert Dollar Company of San Francisco. They were drawing drafts right along.

Q. In December—that is, on the 15th of December,



(Testimony of S. P. Bartlett.)

1913, when the draft was drawn for that month's pay-roll—did you have any knowledge or any reason to believe that that draft would not be honored by the Dollar Company?

Objected to by the defendant as immaterial, irrelevant and incompetent and not rebuttal.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 11.

The COURT.—Q. Did you have any information or knowledge in December, 1913—that is, at the time this draft was drawn—that that draft would not be honored when it was received here in San Francisco?

A. No.

**[Testimony of George P. Topping, for Plaintiff (in Rebuttal).]**

GEORGE P. TOPPING, a witness called by the plaintiff in rebuttal, testified in substance as follows:

Q. Mr. Topping, do you know whether or not that mortgage [72] that was on the mill and property of the Alfred Johnson Lumber Company was foreclosed?

Objected to by the defendant as immaterial, irrelevant and incompetent and not rebuttal.

Mr. PARTRIDGE.—I think if it is not strictly rebuttal, it is competent evidence.

The COURT.—What is the theory?

Mr. PARTRIDGE.—The theory is, I want to show that the mortgage was foreclosed and how much the property was sold for.

(Testimony of George P. Topping.)

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 12.

A. Yes, I do know. It has been foreclosed and the property sold. I could not give the exact date of the sale, but I think some time during the latter part of August or first of September, 1915. It was sold for approximately \$9,400; that is, it was sold for less than the face of the mortgage.

Here the plaintiff rested.

The foregoing constitutes all of the testimony adduced upon the trial of said cause.

Thereupon counsel for the respective parties argued said cause to the jury, at the conclusion of which the Court instructed the jury as follows:

**[Instructions of Court to Jury.]**

“Gentlemen of the jury, you are perhaps sufficiently aware of the nature of this action at this time. It is an action by the plaintiff to recover by reason of the alleged negligent failure of the defendant to notify the plaintiff of the dishonor of [73] a draft which had been drawn upon the Robert Dollar Company and which, when presented to that company, it appears, was dishonored. Under the principles that I shall state to you, the case is a very simple one. It simply depends upon whether or not, by reason of the act of the defendant, about which there is no controversy under the evidence, the plaintiff lost the money for which suit is being prosecuted, or whether, by reason of the circumstances, the act

of the defendant in nowise contributed to that loss, but that the plaintiff would have lost the money nevertheless.

“A bank undertaking the collection of a foreign draft—and this was what is known as a foreign draft—must use reasonable and due diligence to protect the owner of the draft by taking all such steps by presentment, demand, protest and notice as are necessary to fix the liability of all parties to whom the owner has the right to resort for payment. The collecting bank is bound to present the draft to the drawee at once, and if the drawee does not accept it, then the bank is bound to immediately notify the payee and drawer, and if the bank does not do so it is liable for all damages caused by its failure so to do, that is, all damages proximately flowing from its failure, the measure of damages being the amount of money actually paid out, together with interest.

“The instrument involved in this action is a foreign draft or bill of exchange, and notice of the dishonor of such an instrument can be given only by notice of protest, which must be noted on the day of presentment or the next business day.

“A draft is dishonored when it is either not paid or not accepted on presentment for the purpose. Notice of the dishonor of a draft when given by mail must be deposited in the postoffice in time for the first mail which closes after noon of the first business day succeeding the dishonor and which leaves the place where the instrument was dishonored for the place to which the notice should be sent. All of

these are code provisions. [74]

“If you find that a usage existed between the parties from their course of dealing whereby plaintiff, in the ordinary course of business, advanced money to the Alfred Johnson Lumber Company immediately upon the latter drawing a draft in favor of the former, and that because of this usage there was an implied agreement between the plaintiff and defendant under which defendant was to notify plaintiff by telegraph immediately upon the nonacceptance or dishonor of any such draft exceeding five hundred dollars in amount; and if you further find that through defendant’s negligence plaintiff was not so notified by telegraph or in any other manner promptly of the nonacceptance of the draft involved in this case, and that solely because of such negligence of defendant, plaintiff became unable to collect the money advanced on said draft in accordance with such usage, then defendant would be liable for all money advanced by plaintiff on said draft to the drawer, even though advanced before the draft had been received by the defendant for collection.

“If prompt notice of the dishonor of a bill of exchange or draft is not given to the drawer, then it is exonerated—that is, the drawer—from all liability on the draft. It would therefore make no difference, under such circumstances, whether the drawer was insolvent or not, because it would not be required to make good the amount.

“The burden of proof is upon the plaintiff to show by a preponderance of evidence the facts upon which



it relies for recovery, the amount of money that it advanced on the draft to the drawer, and to show that its failure to collect that money was directly and proximately caused by the act or omission of the defendant alleged in the complaint.

“If, therefore, you find that the plaintiff, after having been actually notified of the nonacceptance by defendant, even [75] though such notice was not promptly given, could by reasonable effort have collected from the drawer the amount of money advanced to the latter, then plaintiff would not be entitled to recover. If it could not have so recouped itself, then the defendant is liable for the loss. It was only bound to use such reasonable diligence as a business man of ordinary prudence would have used under like circumstances. You will understand, therefore, that before you can find for the plaintiff it must appear that defendant’s action, in view of the course of dealing between the parties, caused the plaintiff to change its position toward the drawer of the draft, and by such act plaintiff either gave credit to the drawer that it might otherwise not have given, or refrained from taking legal proceedings to protect itself for the advances made by it to the drawer.

“Now, on the subject of the insolvent condition of the parties which has been, to some extent, argued before you, I advise you thus: A person or corporation is insolvent whenever the aggregate of his or its property, exclusive of any property which he or it may have conveyed, transferred, concealed or removed, or permitted to, be concealed or removed,

with intent to defraud, hinder or delay his or its creditors, shall not, at a fair valuation, be sufficient in amount to pay his or its debts.

“The lien of an attachment obtained by any creditor upon any property of a debtor is dissolved by the adjudication of bankruptcy of a person or corporation whose property is so attached within four months before the filing of bankruptcy proceedings, either against such person or corporation by the creditors or by the person or corporation themselves, if such lien of the attachment was obtained and permitted while the person or corporation was insolvent, and that the existence and enforcement of such lien of attachment will work a preference or the creditor so attaching had [76] reasonable cause to believe the person or corporation debtor was insolvent and in contemplation of bankruptcy at the time of such attachment. I state to you this latter principle, because of the contentions put forth by the defendant here.

“You are to determine, under all the circumstances that have been submitted to you here, and from all the evidence in the case, what the real situation was in reference to this transaction. It does not appear here in any direct, positive way that the Johnson Lumber Company was insolvent within the definition which I have given you from the bankruptcy act. There is evidence here, however, from which the jury would be at liberty to so infer.

“There was testimony given by Mr. Stanley Dollar on the witness stand that he examined the books of

the Johnson Lumber Company, and he said it was in an insolvent condition. Now, of course, that evidence is not evidence of insolvency—I mean such evidence does not of itself necessarily establish insolvency. Insolvency is a legal status, and it is the result of the existence of the conditions which the bankruptcy act has given as constituting insolvency, and which I have read to you. And a witness merely saying that a party is insolvent is therefore stating a mere conclusion; and you will understand that you are not bound from the testimony of that witness alone to determine that the Johnson Lumber Company was insolvent at the time. You have a right to consider the facts which the witness stated, though, independently of that conclusion, together with all of the other evidence in the case in determining whether it was solvent.

“The question of the insolvency of the Johnson Lumber Company, and its financial ability to meet its obligations, is only material in this case as bearing upon the question whether or not, had the plaintiff in this case been afforded an opportunity to attach that property, such attachment would have availed to [77] secure a liquidation of their debt, the theory of the defendant being that if they had notified them in time to levy such an attachment, that the interposition of bankruptcy proceedings would have negatived the value of any such attachment. It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man may be in shaky circumstances, that because he may actually be in insolvent

circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor's claim without actually putting him into insolvency; but, nevertheless, you have a right, under all the evidence that has been submitted to you, to determine what would have been the probable effect of the levying of the attachment for the claim of plaintiff which is here sued upon, had they been notified in time of the dishonor of this draft.

“As I suggested at the beginning, the liability of the defendant for this obligation growing out of its tort—because negligence under such conditions gives rise to a tortious demand—depends upon the question whether the plaintiff's loss arose through that act, or whether it would have suffered the loss independently of that act—whether, in the event that the defendant had strictly and in accordance with its legal obligations, given a notice promptly and had the draft protested, it would have availed the plaintiff, and it could have saved itself by proper proceedings. If it would, the plaintiff is undoubtedly, under the facts before you, entitled to recover, because as to those facts there is very little, if any, controversy, If it would not, however, why, then of course, the plaintiff would be left in no worse position than it would have been in had the notice been given promptly. [78]



Thereupon counsel for defendant, before the jury retired, excepted to the said charge to the jury, and to the refusal of the Court to give as a part of the Court's charge instructions requested by the defendant as follows:

Mr. HUBBARD.—We at this time except to the refusal of the Court to give instructions 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14 and 15 as requested by the defendant; and to giving the instructions as to usage, and its effect and binding force upon the defendant; the instructions as to exoneration; the instruction as to recoupment, as to insolvency, as to the testimony of Stanley Dollar and the instruction as to the consideration of insolvency in connection with that, and as to bankruptcy not necessarily following from insolvency.

The instructions requested in writing by the defendant and furnished to the Court at the time and as required by law and the rules of said court, and which the Court failed and refused to give, are as follows, to wit:

**[Instructions to Jury Requested by Defendant and Refused.]**

**Instruction No. 1.**

You are instructed that the burden of proof is upon the plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that between the 19th and the 29th day of December, 1913, it advanced to the Alfred Johnson Lumber Company, a corporation, Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents

(\$5,887.78) upon the draft introduced in evidence here as Plaintiff's Exhibit #1.

Instruction No. 2.

You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that it could have attached the cargo or other property of the Alfred Johnson Lumber Company, a corporation, between the 19th and 29th days of December, 1913, and [79] that it could by reason of such attachment have saved itself the full sum of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), and before you can find that it could, by reason of any such attachment, have saved the said sum of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), you must further find from the evidence that the said Alfred Johnson Lumber Company, a corporation, was solvent during the said time, between said December 19th and 29th, 1913, and that said attachment would not have been dissolved or discharged by the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, within four (4) months after such attachment had been levied.

Jefferson Co. Savings Bank vs. Hendrix, 1 L.

R. A. (N. S.) 246, 14 L. R. A. (N. S.) 686.

Brown v. Peoples Bank, 52 L. R. A. (N. S.) 660,  
663, notes.

Instruction No. 3.

You are instructed that the burden of proof is

upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that any loss it may have sustained either from any indebtedness that was due to it from the Alfred Johnson Lumber Company, a corporation, on December 19th, 1913, or for any money that it may have advanced to said Alfred Johnson Lumber Company, a corporation, between December 15th and 29th, 1913, was solely, directly and proximately caused by the acts of the defendant, American National Bank, a corporation, in erroneously notifying plaintiff, Bank of Bandon, a corporation, on December 19th, 1913, that said draft had been accepted when it had not and failing, until December 29th, 1913, to notify plaintiff, Bank of Bandon, a corporation, that the draft had not been accepted; and in order for you to find that such acts on the part of defendant, American National Bank, a corporation, were the sole, proximate and direct [80] causes of such loss to plaintiff, Bank of Bandon, a corporation, you must further find from the evidence not only that the plaintiff, Bank of Bandon, a corporation, could have attached property of the Alfred Johnson Lumber Company, a corporation, between said December 19th and 29th, 1913, which property would be subject to attachment for said total indebtedness of Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78) and sufficient in amount from which said Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78) could have been realized, but you must also find from the evidence that said Alfred Johnson

Lumber Company, a corporation, was, between said dates, solvent, and that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, and that the plaintiff, Bank of Bandon, a corporation, refrained from attaching such property of the Alfred Johnson Lumber Company, a corporation, solely by reason of the fact that defendant, American National Bank, a corporation, had notified plaintiff on December 19th, 1913, that said draft had been accepted.

Instruction No. 4.

You are instructed that before you can render a verdict for plaintiff and against defendant, for any sum whatever, you must find from the evidence, not only that plaintiff has sustained actual damage from some act or omission of defendant, but that such actual damage was directly and proximately caused by defendant's act or omission, and not by some other act over which defendant had no control.

Instruction No. 5.

You are instructed that even though you should find from the evidence that plaintiff did refrain from attaching the cargo of cedar of the Alfred Johnson Lumber Company, a corporation, by [81] reason of the notification plaintiff received from defendant on December 19th, 1913, that the draft had been accepted; before you can find a verdict for plaintiff, you must further find from the evidence that plaintiff could have kept said cedar under attachment until it could have obtained judgment against said



Alfred Johnson Lumber Company, a corporation, and satisfaction of said judgment out of said attached cedar; and you must further find from the evidence that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, or by reason of any other act, within four (4) months after such attachment was levied.

Instruction No. 8.

You are further instructed that you should find from the evidence that even though the defendant did not notify the plaintiff that the draft had not been accepted until December 29th, 1913, yet, if you should further find from the evidence that the Alfred Johnson Lumber Company, a corporation, had assets sufficient in amount to satisfy plaintiff's claim of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78) at any time after December 29th, 1913, against the Alfred Johnson Lumber Company, a corporation, and if you further find from the evidence that the plaintiff did not so attach such assets of the Alfred Johnson Lumber Company, a corporation, and thereby protect itself, your verdict must be for the defendant.

Instruction No. 9.

You are instructed that if the evidence shows the Alfred Johnson Lumber Company was a solvent, going concern on the 15th day of December, 1913, and was such thereafter up to and including the

29th day of December, 1913, you may consider this fact as bearing upon the question as to whether the Bank of Bandon would have attached [82] the cargo of lumber on board the ship "Grace Dollar," upon being informed on the 29th day of December, 1913, by defendant bank that the Robert Dollar Company had refused to accept the draft in question. In other words, you are not to conclude that merely because the acceptance of the draft by the Robert Dollar Company was refused on the 29th day of December, 1913, that such refusal operated to change the status of the Alfred Johnson Lumber Company from one of solvency to one of insolvency, or that such refusal was any ground for legal action by means of attachment or otherwise by the Bank of Bandon against the Alfred Johnson Lumber Company.

Instruction No. 10.

You are instructed to disregard all testimony as to any payments or advances made by the plaintiff, Bank of Bandon, to the Alfred Johnson Lumber Company upon the draft between December 15, 1913, and December 19, 1913, which said sums, according to the testimony, amount to the sum of Four Thousand Two Hundred and Eighty-seven Dollars and Thirty-six Cents (\$4,287.36).

Instruction No. 11.

You are instructed that before you can find for the plaintiff, you must find from the evidence that the defendant by some act of omission or commission on its part caused the Bank of Bandon to change its position toward the Alfred Johnson Lumber Com-

pany, and by such act of the defendant, plaintiff either gave credit to the Alfred Johnson Lumber Company that it would not otherwise have given except for such act of omission or commission on the part of the defendant bank or refrained from taking legal proceedings to protect itself for any advances made by it to the Alfred Johnson Lumber Company; and you must further find from the evidence that such legal proceedings that it would have taken, except for such act of omission or commission on the part of the defendant bank, would have resulted in the plaintiff Bank of Bandon protecting [83] itself by reason of such legal proceedings which it might have taken.

Instruction No. 12.

You are instructed that where a bank accepts a bill of exchange or a draft for collection, it is bound to present the paper to the drawee at once, and if the drawee does not accept it, then the bank is bound to immediately notify the payee and the drawer; and if the bank does not do so, it is liable for all damages caused by its failure so to do; but the measure of damage is the amount actually paid out subsequent to the time at which the payee and the drawer should have been notified by the bank. All moneys paid out by the payee before the collecting bank has an opportunity to present the bill of exchange or draft to the drawee for acceptance are not chargeable to the bank; the bank is only liable for the damage sustained by the payee after a failure to present the bill of exchange or draft, as under the law it is required to do. If, therefore, you should find that the payee,

the Bank of Bandon, on December 15, 1913, sent a draft drawn by the Alfred Johnson Lumber Company to the American National Bank for the purpose of presenting it for acceptance to the Robert Dollar Company, but thereafter, and before the American National Bank actually received said draft, or had an opportunity of presenting said draft to the Robert Dollar Company for acceptance, the Bank of Bandon placed to the credit of Alfred Johnson Lumber Company an amount of money aggregating the sum of Forty-two Hundred Eighty-seven Dollars and Thirty-six Cents (\$4,287.36), then I charge you that said American National Bank is not liable for the sum of money so placed to the credit of Alfred Johnson Lumber Company. [84]

Instruction No. 13.

I instruct you that it is not the law that merely because the Robert Dollar Company may have honored every draft presented to it by the American National Bank at the instance of the Bank of Bandon prior to December 15, 1913, the Robert Dollar Company was under any obligation to accept the draft in question; nor is it the law that the American National Bank, a mere agent for collection purposes of the Bank of Bandon, could be held liable for any moneys that the latter bank may have advanced to the Alfred Johnson Lumber Company prior to the time that such draft was received by the American National Bank.

Instruction No. 14.

You are instructed that if you find that it had been



the custom of the Robert Dollar Company to honor all drafts drawn by Alfred Johnson Lumber Company, such custom would not operate to render the American National Bank liable for advances by the Bank of Bandon prior to the date the draft reached the American National Bank, which, according to the evidence, was on the 19th day of December, 1913. Such custom, even if it could be held to be binding upon the Robert Dollar Company, would not be binding upon the American National Bank, for the custom, even if it exists, or had existed, established no contractual relation even by implication between the American National Bank and the Bank of Bandon. The liability of the American National Bank, as I have before instructed you, is made to depend solely upon the proposition whether or not the Bank of Bandon suffered loss or damage subsequent to the 19th day of December, 1913, on account of the failure of the American National Bank to present the draft in question to the Robert Dollar Company for acceptance, and for also having failed to notify the Bank of Bandon and the Alfred Johnson Lumber Company of what action it had taken with reference to the presentation of the draft. [85]

Instruction No. 15.

I instruct you that if, from the consideration of the evidence, you shall find that the Bank of Bandon sustained any loss or damage, such loss or damage must relate to the period of time subsequent to the 19th day of December, 1913, for under the circumstances of this case, it could not be held liable for any moneys that may have been advanced by the

Bank of Bandon to the Alfred Johnson Lumber Company prior to the date that the said draft was received by the American National Bank.

That after the Court had instructed the jury as above set forth, the cause was submitted to the jury, and the jury retired to deliberate upon the same, and thereafter returned into court and returned a verdict in favor of the plaintiff and against the defendant for the sum of Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), and which verdict was and is in the words and figures following, to wit:

**Verdict.**

(Title of Court and Cause.)

“We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Five Thousand Eight Hundred and Eighty-seven 78/100 Dollars.

A. W. LAWSON,

Foreman.

To which verdict and the whole thereof defendant then and there objected and excepted, and does hereby except, and specifies the same as error No. 36.

The foregoing constitutes all the proceedings had upon said trial. [86]

WHEREFORE, the defendant presents the above and foregoing as a full, true and correct Bill of Exceptions of all the proceedings had upon said trial and of its objections and exceptions, and prays that

the same may be settled and allowed as such.

EDGAR C. CHAPMAN,  
WILLIAM P. HUBBARD,  
Attorneys for Defendant.

Dated October 25th, 1915.

**[Stipulation Re Bill of Exceptions.]**

It is hereby stipulated and agreed that the above and foregoing is a full, true and correct bill of exceptions of all the proceedings had upon the trial of the above-entitled action, and that the same may be signed and settled and be used as such bill of exceptions upon the hearing by the United States Circuit Court of Appeals, Ninth Circuit.

Dated January 10th, 1916.

MASTICK & PARTRIDGE,  
Attorneys for Plaintiff.  
EDGAR C. CHAPMAN,  
WILLIAM P. HUBBARD,  
Attorneys for Defendant.

The foregoing bill of exceptions is hereby settled and allowed.

WM. C. VAN FLEET,  
Judge.

February 29th, 1916.

[Endorsed]: Filed Feb. 29, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [87]

*In the District Court of the United States, for the  
Northern District of California, Second Division.*

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,

Defendant.

**Petition for Writ of Error and Supersedeas.**

American National Bank, a Corporation, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 15th day of September, 1915, comes now by Edgar C. Chapman, Esq., and William P. Hubbard, Esq., its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.



And your petitioner will ever pray.

EDGAR C. CHAPMAN,

WILLIAM P. HUBBARD,

Attorneys for Defendant.

Dated February 8th, 1916.

Receipt of a copy of the within Petition for Writ of Error on the 8th day of February, 1916, is hereby admitted.

MASTICK & PARTRIDGE,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 8, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [88]

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*In the District Court of the United States, for the Northern District of California, Second Division.*

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,

Defendant.

**Assignment of Errors.**

Now comes the defendant in the above-entitled action, and files the following Assignment of Errors on which it will rely in the prosecution of its writ of error in the above-entitled cause from the judgment made by this Honorable Court on the 15th day of September, 1915.

That the District Court of the United States, for the Northern District of California, Second Division, erred in the following rulings during the progress of the trial of said cause, to wit:

1. The Court erred in refusing to permit the defendant to ask the question on cross-examination of the witness George P. Topping as to the probable effect that an attachment levied by the plaintiff on the Alfred Johnson Lumber Company's property would have had in plunging it into bankruptcy, which question followed the following question and answer:

“Q. You did not go into the question, then, as to whether, if you had attached, whether or not it would have been plunged into bankruptcy by other creditors?

“A. That is a possibility, yes, at all times.

[89]

“Q. This particular case, Mr. Topping, which we have discussed, was not that a possibility which confronted you?”

Which last question was objected to by the plaintiff on the ground that it was immaterial and incompetent, and that the defendant could not hide behind a mere possibility. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the same as error No. 1 in its bill of exceptions.

2. The Court erred in refusing to permit the defendant to ask the witness R. Stanley Dollar, who showed himself fully acquainted with the business

and affairs of the Alfred Johnson Lumber Company between December 15, 1913, and January 14, 1914, to answer as to those affairs in reply to the following question:

“Q. How did the affairs stand at that time—between those dates, December 15th and December 29th?”

Which question was objected to by the plaintiff as incompetent, irrelevant and immaterial, and that the agent, the collecting bank holding the papers for collection, could not protect itself by taking refuge behind the fact that the drawee of a bill of exchange does not hold funds of the drawer. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the same as error No. 2 in its bill of exceptions.

3. The Court erred in refusing to permit the defendant to ask the witness R. Stanley Dollar to testify as to the general financial status of the Alfred Johnson Lumber Company as to solvency or insolvency, after he had testified that he went through the books of the Alfred Johnson Lumber Company to ascertain the status of its financial affairs, which question was as follows:

“Q. Now, from that going through the books what did you ascertain as to the general financial status of the Alfred Johnson [90] Lumber Company as to solvency or insolvency as it appeared subsequent to the 15th of December, 1913?”

Which question was objected to by the plaintiff as immaterial, irrelevant, incompetent, and not the best

evidence and calling for the conclusion of the witness. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the same as error No. 3 in its bill of exceptions.

4. The Court erred in refusing to permit the defendant to ask of the witness R. Stanley Dollar as to what position in reference to the affairs of the Alfred Johnson Lumber Company the Robert Dollar Company would have taken in December, 1913, had it known that a cargo of cedar had been attached or was about to be attached by the plaintiff upon this draft in question, which question was as follows:

“Q. Mr. Dollar, what position in reference to the affairs of the Alfred Johnson Lumber Company would the Robert Dollar Company have taken had it known that this particular cargo of cedar had been attached or was about to be attached by the Bank of Bandon?”

Which question was objected to by the plaintiff as irrelevant and incompetent. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the same as error No. 4 in its bill of exceptions. x

5. The Court erred in refusing to permit the defendant to ask of the witness R. Stanley Dollar what the arrangement was between the creditors and the Alfred Johnson Lumber Company, which question was as follows:

“Q. What was that arrangement?”

Which question was objected to by the plaintiff as



not the best evidence. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the [91] same as error No. 5 in its bill of exceptions.

6. The Court erred in permitting the plaintiff to ask of the witness Frank P. Doe as to whether the Coquille Mill & Towboat Company has received any money from the Alfred Johnson Lumber Company on the 28th of January, 1914, which question was as follows:

“Q. Now, Mr. Doe, refreshing your memory from that in your own handwriting, will you state whether or not you received any money from the Alfred Johnson Lumber Company on the 28th of January, 1914?”

Which question was objected to by the defendant as immaterial, irrelevant and incompetent. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 6 in its bill of exceptions.

“A. Yes, we did.

7. The Court erred in permitting the witness Frank P. Doe to answer the question asked by the plaintiff as to the amount of payment made by the Alfred Johnson Lumber Company to the Coquille Mill & Towboat Company on the 28th of January, 1914, which question was as follows:

“Q. How much?”

Which question was objected to by the defendant as immaterial, irrelevant and incompetent. Which objection was by the Court overruled, and to which

defendant then and there duly excepted, and specifies the same as error No. 7 in its bill of exceptions.

“A. \$269.40.”

8. The Court erred in permitting the plaintiff to ask the witness Frank P. Doe in rebuttal as to what such payment was for, which question was as follows:

“Q. What was that for?”

Which question was objected to by the defendant as incompetent, irrelevant and immaterial. Which objection was by the [92] Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 8 in its bill of exceptions.

“A. That was for logs sold prior to the first of January—that is stumpage I mean.”

9. The Court erred in permitting the plaintiff to ask the witness Frank P. Doe in rebuttal in what way that amount was paid to the Coquille Mill & Towboat Company, which question was as follows:

“Q. Now, then, in what way was that amount paid to you?”

Which question was objected to by the defendant as irrelevant, incompetent and immaterial. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 9 in its bill of exceptions.

“A. By the Robert Dollar Company.”

10. The Court erred in permitting the plaintiff to ask the further question of the witness Frank P. Doe in rebuttal as follows:

“Q. By a draft on them by the Alfred Johnson Lumber Company, you mean?”

Which question was objected to by the defendant as irrelevant, incompetent and immaterial. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 10 in its bill of exceptions.

“A. No. As I recollect, this amount was due, and they sent us out their check for it.”

11. The Court erred in permitting the plaintiff to ask of the witness S. P. Bartlett in rebuttal as to his knowledge or reason to believe that the draft drawn on December 15, 1913, upon the Robert Dollar Company would not be honored, which question was as follows: [93]

“Q. In December—that is, on the 15th of December, 1913, when the draft was drawn for that month’s pay-roll—did you have any knowledge or any reason to believe that the draft would not be honored by the Dollar Company?”

Which question was objected to by the defendant as irrelevant, incompetent and immaterial and not rebuttal. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 11 in its bill of exceptions.

“A. No.”

12. The Court erred in permitting the plaintiff to ask of the witness George P. Topping in rebuttal as to whether the mortgage about which he had testified previously as being on the property of the

Alfred Johnson Lumber Company was foreclosed, which question was as follows:

“Q. Mr. Topping, do you know whether or not that mortgage that was on the mill and property of the Alfred Johnson Lumber Company was foreclosed?”

Which question was objected to by the defendant as immaterial, irrelevant and incompetent, and not rebuttal. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 12 in its bill of exceptions.

“A. Yes, I do know. It had been foreclosed and the property sold. I could not give the exact date of the sale, but I think some time during the latter part of August or first of September, 1915. It was sold for approximately \$9,400; that is, it was sold for less than the face of the mortgage.”

13. The Court erred in orally instructing the jury as follows:

“Gentlemen of the jury, you are perhaps sufficiently aware [94] of the nature of this action at this time. It is an action by the plaintiff to recover by reason of the alleged negligent failure of the defendant to notify the plaintiff of the dishonor of a draft which had been drawn upon the Robert Dollar Company, and which, when presented to that company, it appears, was dishonored. Under the principles that I shall state to you, the case is a very simple one. It



simply depends upon whether or not, by reason of the act of the defendant, about which there is no controversy under the evidence, the plaintiff lost the money for which suit is being prosecuted, or whether, by reason of the circumstances, the act of the defendant in nowise contributed to that loss, but that the plaintiff would have lost the money nevertheless.

“A bank undertaking the collection of a foreign draft—and this was what is known as a foreign draft—must use reasonable and due diligence to protect the owner of the draft by taking all such steps by presentment, demand, protest and notice as are necessary to fix the liability of all parties to whom the owner has the right to resort for payment. The collecting bank as bound to present the draft to the drawee at once, and if the drawee does not accept it, then the bank is bound to immediately notify the payee and drawer, and if the bank does not do so it is liable for all damages caused by its failure so to do, that is, all damages proximately flowing from its failure, the measure of damages being the amount of money actually paid out, together with interest.”

To the giving of which said instruction the defendant objected and excepted and hereby excepts, and specifies that said instruction does not state correct principles of law in the following particulars:

(a) In that the collecting bank is not bound to present the draft to the drawee at once, or at all,

where the drawer is insolvent, and where the drawee has no funds of the drawer, but, on [95] the contrary holds large obligations of the drawer aggregating ten times the value of the drawer's assets;

(b) In that the measure of damages recoverable against the collecting bank does not include the amount of moneys paid out by the payee to the drawer prior to the time at which the collecting bank received such draft, or had an opportunity of presenting it for acceptance;

(c) In that the collecting bank is not bound to immediately or ever notify the payee and drawer, where both of them know that the drawer is insolvent, and that the drawee is a creditor of the drawer to the extent of \$97,000—or fully nine times the value of the drawer's available assets;

(d) In that this instruction in stating that the collecting bank is bound to notify the payee and drawer conflicts with the following instruction given by the Court.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 13 in its bill of exceptions.

14. The Court erred in orally instructing the jury as follows:

“The instrument involved in this action is a foreign draft or bill of exchange, and notice of the dishonor of such an instrument can be given only by notice of protest, which must be noted on the day of presentment or the next business day.”

To the giving of which instruction the defendant objected and excepted, and specifies the following ground of objection and exception to said instruction—namely, that said instruction conflicts with the immediately preceding instruction in instructing the jury that the notice of protest must be noted on the day of presentment or the next business day.

To the giving of which instruction the defendant objected [96] and excepted and hereby excepts, and specifies the same as error No. 14 in its bill of exceptions.

15. The Court erred in orally instructing the jury as follows:

“A draft is dishonored when it is either not paid or not accepted on presentment for the purpose. Notice of the dishonor of a draft when given by mail must be deposited in the postoffice in time for the first mail which closes after noon of the first business day succeeding the dishonor and which leaves the place where the instrument was dishonored for the place to which the notice should be sent. All of these are code provisions.

“If you find that a usage existed between the parties from their course of dealing, whereby plaintiff, in the ordinary course of business, advanced money to the Alfred Johnson Lumber Company immediately upon the latter drawing a draft in favor of the former, and that because of this usage there was an implied agreement between the plaintiff and defendant under which defendant was to notify plaintiff by telegraph immediately upon the nonacceptance or dis-

honor of any such draft exceeding five hundred dollars in amount; and if you further find that through defendant's negligence plaintiff was not so notified by telegraph or in any other manner promptly of the nonacceptance of the draft involved in this case, and that solely because of such negligence of defendant plaintiff became unable to collect the money advanced on said draft in accordance with such usage, then defendant would be liable for all money advanced by plaintiff on said draft to the drawer, even though advanced before the draft had been received by the defendant for collection."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception: [97]

(a) In that the Court instructed the jury that an implied agreement could exist which would bind the collecting bank to reimburse the plaintiff for moneys advanced to the drawer, amounting to \$4,287.36, before the receipt of the draft by the collecting bank—such agreement arising out of a custom to the effect that all drafts theretofore drawn had been accepted by the Robert Dollar Company;

(b) In that by this instruction the Court instructed the jury that the defendant was liable for all money advanced by plaintiff on the draft to the drawer—even though such money was advanced before the draft had been received or could by any possibility have been received by the defendant;



(c) In that by said instruction the Court instructed the jury that the defendant was liable to the plaintiff solely by reason of this usage or custom, regardless of the fact that the defendant could not by any possible means have had knowledge of the existence of the draft or received the same until four days after it was drawn and deposited with the plaintiff;

(d) In that the Court asserts that the liability of the defendant is made to depend upon the mere fact that defendant failed to notify plaintiff promptly of the dishonor or acceptance of the draft, rather than upon the proposition that defendant's liability is made to depend solely upon the amount of actual damages sustained by plaintiff arising out of and directly traceable to the failure of defendant to give prompt notice of such dishonor or acceptance; in other words, the defendant's liability is not to be measured by the amount of the face of the draft in question, but by ascertaining to what extent defendant's negligence contributed to plaintiff's loss, if any.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 15 in its bill of exceptions. [98]

16. The Court erred in orally instructing the jury as follows:

“If prompt notice of the dishonor of a bill of exchange or draft is not given to the drawer, then it is exonerated—that is, the drawer,—

from all liability on the draft. It would therefore make no difference, under such circumstances, whether the drawer was insolvent or not, because it would not be required to make good the amount."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception;

(a) In that by said instruction the Court instructed the jury that failure to give prompt notice of the dishonor of the draft to the Alfred Johnson Lumber Company would release it from all liability on the draft; while as a matter of law the question of whether the Alfred Johnson Lumber Company would be released from all liability to pay plaintiff would be made to depend upon the good faith of the Alfred Johnson Lumber Company in drawing such draft on the Robert Dollar Company. If the Alfred Johnson Lumber Company, when it drew the draft upon the Robert Dollar Company, was a creditor of the latter company to the extent of \$97,000 and knew that it was insolvent, then, as a matter of law, the Alfred Johnson Lumber Company was not injured by the negligence of defendant above mentioned;

(b) In that the drawer is not exonerated from all liability upon the draft for the failure of the collecting bank to give prompt notice to the drawer of its dishonor, where at the time of drawing the draft he had reason to believe that it would be accepted. The fact that the drawee had accepted other drafts from time to time could not operate to discharge an insol-

vent drawer from the full amount of the liability which would have rested [99] upon him had no draft been drawn;

(c) In that the Court erroneously instructed the jury that under the circumstances of this case it made no difference whether the drawer was insolvent or not for the reason that the drawer would not be required to make good the amount of the draft; when it is unquestionably the law that the drawer is not relieved from liability where at the time of issuing the draft it had placed no funds in the hands of the Robert Dollar Company, and was without the expectation thereafter of placing any funds in its hands;

(d) In that the Court by this instruction instructed the jury that the insolvency of the drawer was not to be considered material in determining this case;

(e) In that this instruction conflicts with and is contradictory to subsequent instructions given by the Court upon the question of insolvency;

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 16 in its bill of exceptions.

17. The Court erred in instructing the jury orally as follows:

“The burden of proof is upon the plaintiff to show by a preponderance of evidence the facts upon which it relies for recovery, the amount of money that it advanced on the draft to the drawer, and to show that its failure to collect

that money was directly and proximately caused by the act or omission of the defendant alleged in the complaint.”

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception: [100]

(a) In that the Court failed to instruct the jury that the burden of proof was upon the plaintiff to also show by a preponderance of evidence that the Alfred Johnson Lumber Company was solvent at the time it (plaintiff) advanced the money on the draft, and became insolvent prior to the time that the plaintiff received notice that the draft had not been accepted by the Robert Dollar Company;

(b) In that the Court by specifying the specific matters in said instruction which must be proved by the plaintiff by a preponderance of evidence thereby led the jury to believe that it was not incumbent upon the plaintiff to establish other essential facts by a preponderance of evidence before a verdict could be rendered in favor of the plaintiff—namely, that the plaintiff should show by a preponderance of evidence that it could have protected itself for the money it advanced upon the draft, had it received notice from the defendant that the draft had not been accepted, and that the Alfred Johnson Lumber Company was not insolvent at the time plaintiff contended it could have attached the cargo of cedar.”

To the giving of which instruction the defendant objected and excepted and hereby excepts, and



specifies the same as error No. 17 in its bill of exceptions.

17½. The Court erred in instructing the jury orally as follows:

“If, therefore, you find that the plaintiff, after having been actually notified of the nonacceptance by defendant, even though such notice was not promptly given, could by reasonable effort have collected from the drawer the amount of money advanced to the latter, then the plaintiff would not be entitled to recover. If it could not have so recouped itself, then the defendant is liable for the loss. It was only bound to use such reasonable diligence [101] as a business man of ordinary prudence would have used under like circumstances. You will understand, therefore, that before you can find for the plaintiff it must appear that defendant’s action, in view of the course of dealing between the parties, caused the plaintiff to change its position toward the drawer of the draft, and by such act plaintiff either gave credit to the drawer that it might otherwise not have given, or refrained from taking legal proceedings to protect itself for the advances made by it to the drawer.”

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exceptions

(a) In that the Court instructed the jury that if the plaintiff could have recouped itself from loss by reason of the advance upon the draft, that such fact

entitled plaintiff to a recovery—regardless of the fact as to whether the Alfred Johnson Lumber Company was then solvent or insolvent, and regardless of the fact as to whether the plaintiff was justified in advancing the money upon the draft before the draft could possibly have reached the defendant, or before the defendant could by any possible means have communicated with the plaintiff or the Alfred Johnson Lumber Company as to the nonacceptance of said draft;

(b) In that this instructon instructed the jury that the defendant was liable to the plaintiff for the money advanced upon the draft, regardless of any other conditions which might have existed whereby plaintiff might have been prevented from recovering from the Alfred Johnson Lumber Company;

(c) In that the said instruction instructed the jury that the previous course of dealing between the parties would entitle the plaintiff to advance the money on the draft, regardless of the fact that the testimony shows that the sum of \$4,287.36 was advanced by the plaintiff to the Alfred Johnson Lumber Company [102] upon the draft before the draft could by any possibility have reached the defendant;

(d) In that the Court instructed the jury that the defendant would be liable to the plaintiff by reason of the course of dealing between the parties, regardless of the fact that the sum of \$4,287.36 was advanced upon the said draft by the plaintiff to the Alfred Johnson Lumber Company prior to the time that the said draft could by any possibility have

reached the defendant, and regardless of the fact that at all times from and after December 15, 1913, to the middle of January, 1914, the Alfred Johnson Lumber Company was insolvent and indebted to numerous creditors in the sum of \$147,400, and had no assets other than the cargo of cedar of the value of about \$10,000 or \$12,000.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 17½ in its bill of exceptions.

18. The Court erred in instructing the jury orally as follows:

“Now, on the subject of the insolvent condition of the parties which has been, to some extent, argued before you, I advise you thus: A person or corporation is insolvent whenever the aggregate of his or its property, exclusive of any property which he or it may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his or its creditors, shall not, at a fair valuation, be sufficient in amount to pay his or its debts.

“The lien of an attachment obtained by any creditor upon any property of a debtor is dissolved by the adjudication of bankruptcy of a person or corporation whose property is so attached within four months before the filing of bankruptcy proceedings, either against such person or corporation by the creditors or by [103]

the person or corporation themselves, if such lien of the attachment was obtained and permitted while the person or corporation was insolvent, and that the existence and enforcement of such lien of attachment will work a preference or the creditor so attaching had reasonable cause to believe the person or corporation debtor was insolvent and in contemplation of bankruptcy at the time of such attachment. I state to you this latter principle because of the contentions put forth by the defendant here.”

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception:

In that by said instruction the Court, after correctly stating the law to the jury as to the effect of an attachment levied within four months before the filing of bankruptcy proceedings, added to the instruction this clause: “I state to you this latter principle because of the contentions put forth by the defendant here”; in that such statement led the jury to believe that the Court regarded such statement of the law as having no effect in determining the issues of the case.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 18 in its bill of exceptions.

19. The Court erred in instructing the jury orally as follows:



“You are to determine, under all the circumstances that have been submitted to you here, and from all the evidence in the case, what the real situation was in reference to this transaction. It does not appear here in any direct, positive way that the Johnson Lumber Company was insolvent within the definition which I have given you from the bankruptcy act. There is evidence here, however, from which the jury would be at liberty to so infer.” [104]

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception;

(a) In that the Court by said instruction instructed the jury that they might consider all the circumstances that had been submitted to them, rather than confine themselves exclusively to the evidence in the case;

(b) In that the Court by this instruction instructed the jury that it did not appear in any direct, positive way that the Alfred Johnson Lumber Company was insolvent within the definition which the Court had given from the bankruptcy act—in the face of the positive, direct and uncontradicted testimony that the Alfred Johnson Lumber Company owed to numerous creditors \$147,400, and did not have assets, at a fair valuation, sufficient in amount to pay its debts, and also in the face of the positive testimony that the Alfred Johnson Lumber Company was insolvent.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 19 in its bill of exceptions.

20. The Court erred in instructing the jury orally as follows:

“There was testimony given by Mr. Stanley Dollar on the witness stand that he examined the books of the Johnson Lumber Company, and he said it was in an insolvent condition. Now, of course, that evidence is not evidence of insolvency—I mean such evidence does not of itself necessarily establish insolvency. Insolvency is a legal status and it is the result of the existence of the conditions which the bankruptcy act has given as constituting insolvency, and which I have read to you. And a witness merely saying that a party is insolvent is therefore stating a mere conclusion; [105] and you will understand that you are not bound from the testimony of that witness alone to determine that the Johnson Lumber Company was insolvent at the time. You have a right to consider the facts which the witness stated, though, independently of that conclusion, together with all of the other evidence in the case in determining whether it was insolvent.”

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception:

(a) In that the Court by said instruction negatived the positive testimony of the witness Stanley Dollar as to the insolvency of the Alfred Johnson Lumber Company by telling the jury that the testimony of this witness was not evidence of insolvency;

(b) In that by this instruction the Court instructed the jury that a witness' testimony that a party was insolvent was stating a conclusion, in the face of the fact that the witness testified fully that his information was gathered from and was a summary or result of a thorough personal examination of all of the books of the Alfred Johnson Lumber Company and a careful examination of its affairs at its place of business in Bandon, at a time when the witness was the representative of the largest creditor of the Alfred Johnson Lumber Company.

(c) In that the Court by the following clause of the instruction, namely: "You have a right to consider the facts which the witness stated, though, independently of that conclusion, together with all of the other evidence in the case in determining whether it was insolvent"—negatived the testimony of the witness Dollar and led the jury to believe that his testimony was not to be believed.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error [106] No. 20 in its bill of exceptions.

21. The Court erred in instructing the jury orally as follows:

"The question of the insolvency of the John-

son Lumber Company, and its financial ability to meet its obligations, is only material in this case as bearing upon the question whether or not, had the plaintiff in this case been afforded an opportunity to attach that property, such attachment would have availed to secure a liquidation of their debt, the theory of the defendant being that if they had notified them in time to levy such an attachment, that the interposition of bankruptcy proceedings would have negatived the value of any such attachment. It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man may be in shaky circumstances, that because he may actually *be insolvent* circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor's claim without actually putting him into insolvency; but, nevertheless, you have a right, under all the evidence that has been submitted to you, to determine what would have been the probable effect of the levying of the attachment for the claim of plaintiff which is here sued upon, had they been notified in time of the dishonor of this draft."



To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception:

(a) In that the Court by this instruction, after stating to the jury the materiality of the question of the insolvency of [107] the Alfred Johnson Lumber Company, negatived the effect of any instruction whatsoever upon the insolvency of the Alfred Johnson Lumber Company and its financial status by the following clause of the instruction: "It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man be in shaky circumstances that because he may actually be in solvent circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor's claim without actually putting him into insolvency." Which said statement was not supported by any evidence, and was outside of the record and unnecessary, and which statement prejudiced the whole of defendant's case in the minds of the jury, and led the jury to believe they could take into consideration mere suppositions, probabilities and matters not in evidence in determining the solvency or insolvency of the Alfred Johnson Lumber Company.

To the giving of which instruction the defend-

ant objected and excepted and hereby excepts, and specifies the same as Error No. 21 in its bill of exceptions.

22. The Court erred in instructing the jury orally as follows:

“As I suggested at the beginning, the liability of the defendant for this obligation growing out of its tort—because negligence under such conditions gives rise to a tortious demand—depends upon the question whether the plaintiff’s loss arose through that act, or whether, it would have suffered the loss independently of that act—whether, in the event that the defendant had strictly and in accordance with its legal obligations, given a notice promptly [108] and had the draft protested, it would have availed the plaintiff and it could have saved itself by proper proceedings. If it would, the plaintiff is undoubtedly, under the facts before you, entitled to recover, because as to those facts there is very little, if any, controversy. If it would not, however, why, then, of course, the plaintiff would be left in no worse position than it would have been in had the notice been given promptly.”

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception:

In that by this instruction the Court attempted to summarize the whole case, and state that the liability of the defendant depended upon the question

whether the plaintiff could have availed itself of proper proceedings and saved itself from loss, and omitted the principal elements of the defendant's case—namely, the question as to whether the plaintiff was not responsible for the loss by reason of its having advanced the sum of \$4,287.36 on the draft to the Alfred Johnson Lumber Company before the draft could have reached the defendant; and also the question as to whether at any time after the advance of such money the plaintiff could have taken any proceedings whatsoever to have collected such money so advanced, by reason of the insolvent condition of the Alfred Johnson Lumber Company;

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 22, in its bill of exceptions.

23. The Court erred in refusing to give the instruction asked by the defendant as follows:

Instruction No. 1.

“You are instructed that the burden of proof is upon the plaintiff, Bank of Bandon, a corporation, to show by the preponderance [109] of the evidence that between the 19th and the 29th days of December, 1913, it advanced to the Alfred Johnson Lumber Company, a corporation, Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), upon the draft introduced in evidence here as Plaintiff's Exhibit #1.”

To the refusal of the Court to give said instruction

the defendant objected and excepted and now excepts, and specifies the same as error No. 23 in its bill of exceptions.

24. The Court erred in refusing to give the instruction asked by the defendant as follows:

Instruction No. 2.

“You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that it could have attached the cargo of lumber or other property of the Alfred Johnson Lumber Company, a corporation, between the 19th and 29th days of December, 1913, and that it could by reason of such attachment have saved itself the full sum of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), and before you can find that it could, by reason of any such attachment, have saved the said sum of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), you must further find from the evidence that the said Alfred Johnson Lumber Company, a corporation, was solvent during the said time, between said December 19th and 29th, 1913, and that said attachment would not have been dissolved or discharged by the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, within four (4) months after such attachment had been levied.

Jefferson Co. Savings Bank vs. Hendrix, 1  
L. R. A. (N. S.) 246; 14 L. R. A. (N. S.) 686.



Brown vs. Peoples Bank, 52 L. R. A. (N. S)  
660, 663, Notes." [110]

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 24 in its bill of exceptions.

25. The Court erred in refusing to give the instruction asked by the defendant as follows:

Instruction No. 3.

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that any loss it may have sustained either from any indebtedness that was due to it from the Alfred Johnson Lumber Company, a corporation, on December 19th, 1913, or for any money that it may have advanced to said Alfred Johnson Lumber Company, a corporation, between December 15th and 29th, 1913, was solely, directly and proximately caused by the acts of the defendant, American National Bank, a corporation, in erroneously notifying plaintiff, Bank of Bandon, a corporation, on December 19th, 1913, that said draft had been accepted when it had not, and failing, until December 29th, 1913, to notify plaintiff, Bank of Bandon, a corporation; that the draft had not been accepted; and in order for you to find that such acts on the part of defendant, American National Bank, a corporation, were the sole, proximate and direct causes of such loss to plaintiff, Bank of Bandon, a corporation, you must fur-

ther find from the evidence not only that the plaintiff, Bank of Bandon, a corporation, could have attached property of the Alfred Johnson Lumber Company, a corporation, between said December 19th and 29th, 1913, which property would be subject to attachment for said total indebtedness of Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), and sufficient in amount from which said Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78) could have been realized, but you must also find from the evidence that said Alfred Johnson Lumber Company, [111] a corporation, was, between said dates, solvent, and that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, and that the plaintiff, Bank of Bandon, a corporation, refrained from attaching such property of the Alfred Johnson Lumber Company, a corporation, solely by reason of the fact that defendant, American National Bank, a corporation, had notified plaintiff on December 19th, 1913, that said draft had been accepted."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 25, in its bill of exceptions.

26. The Court erred in refusing to give the in-

struction asked by the defendant as follows:

Instruction No. 4.

“You are instructed that before you can render a verdict for plaintiff and against defendant, for any sum whatever, you must find from the evidence, not only that plaintiff has sustained actual damage from some act or omission of defendant, but that such actual damage was directly and proximately caused by defendant’s act or omission, and not by some other act over which defendant had no control.”

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 26 in its bill of exceptions.

27. The Court erred in refusing to give the instruction asked by the defendant as follows:

Instruction No. 5.

“You are instructed that even though you should find from the evidence that plaintiff did refrain from attaching the cargo of cedar of the Alfred Johnson Lumber Company, a corporation [112] by reason of the notification plaintiff received from defendant on December 19th, 1913, that the draft had been accepted; before you can find a verdict for plaintiff, you must further find from the evidence that plaintiff could have kept said cedar under attachment until it could have obtained judgment against said Alfred Johnson Lumber Company, a corporation, and satisfaction of said judgment out

of said attached cedar; and you must further find from the evidence that said attachment would not have been dissolved or discharged by reason of the insolvency of bankruptcy of said Alfred Johnson Lumber Company, a corporation, or by reason of any other act, within four (4) months after such attachment was levied."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 27 in its bill of exceptions.

28. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 8.

"You are further instructed that should you find from the evidence that even though the defendant did not notify the plaintiff that the draft had not been accepted until December 29th, 1913, yet, if you should further find from the evidence that the Alfred Johnson Lumber Company, a corporation, had assets sufficient in amount to satisfy plaintiff's claim of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), at any time after December 29th, 1913, against the Alfred Johnson Lumber Company, a corporation, and if you further find from the evidence that the plaintiff did not so attach such assets of the Alfred Johnson Lumber Company, a corporation, and thereby protect itself, your verdict must be for the defendant."



To the refusal of the Court to give said instruction the [113] defendant objected and excepted and now excepts, and specifies the same as error No. 28.

29. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 9.

“You are instructed that if the evidence shows the Alfred Johnson Lumber Company was a solvent, going concern on the 15th day of December, 1913, and was such thereafter up to and including the 29th day of December, 1913, you may consider this fact as bearing upon the question as to whether the Bank of Bandon would have attached the cargo of lumber on board the ship ‘Grace Dollar,’ upon being informed on the 29th day of December, 1913, by defendant bank that the Robert Dollar Company had refused to accept the draft in question. In other words, you are not to conclude that merely because the acceptance of the draft by the Robert Dollar Company was refused on the 29th day of December, 1913, that such refusal operated to change the status of the Alfred Johnson Lumber Company from one of solvency to one of insolvency, or that such refusal was any ground for legal action by means of attachment or otherwise by the Bank of Bandon against the Alfred Johnson Lumber Company.”

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 29 in its bill of exceptions.

20. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 10.

“You are instructed to disregard all testimony as to any payments or advances made by the plaintiff, Bank of Bandon, to the Alfred Johnson Lumber Company upon the draft, between December 15, 1913, and December 19, 1913, which said sums, according to the [114] testimony, amount to the sum of Four Thousand Two Hundred and Eighty-seven Dollars and Thirty-six Cents (\$4,287.36).”

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 30 in its bill of exceptions.

31. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 11.

“You are instructed that before you can find for the plaintiff, you must find from the evidence that the defendant by some act of omission or commission on its part caused the Bank of Bandon to change its position towards the Alfred Johnson Lumber Company, and by such act of the defendant, plaintiff either gave credit to the Alfred Johnson Lumber Company that it would not otherwise have given except for such act of omission or commission on the part of the defendant bank, or refrained from taking legal proceedings to protect itself from any advances made by it to the Alfred Johnson Lumber Com-

pany; and you must further find from the evidence that such legal proceedings that it would have taken, except for such act of omission or commission on the part of the defendant bank, would have resulted in the plaintiff Bank of Bandon protecting itself by reason of such legal proceedings which it might have taken.”

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 31 in its bill of exceptions.

32. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 12.

“You are instructed that where a bank accepts a bill of exchange or a draft for collection, it is bound to present the paper [115] to the drawee at once, and if the drawee does not accept it, then the bank is bound to immediately notify the payee and the drawer; and if the bank does not do so, it is liable for all damages caused by its failure so to do; but the measure of damage is the amount actually paid out subsequent to the time at which the payee and the drawer should have been notified by the bank. All moneys paid out by the payee before the collecting bank has an opportunity to present the bill of exchange or draft to the drawee for acceptance are not chargeable to the bank; the bank is only liable for the damage sustained by the payee after a failure to present the bill of exchange or draft, as under the law it is required

to do. If, therefore, you should find that the payee, the Bank of Bandon, on December 15, 1913, sent a draft drawn by the Alfred Johnson Lumber Company to the American National Bank for the purpose of presenting it for acceptance to the Robert Dollar Company, but thereafter, and before the American National Bank actually received said draft, or had an opportunity of presenting said draft to the Robert Dollar Company for acceptance, the Bank of Bandon placed to the credit of the Alfred Johnson Lumber Company an amount of money aggregating the sum of Forty-two Hundred Eighty-seven Dollars and Thirty-six Cents (\$4,-287.36), then I charge you that said American National Bank is not liable for the sum of money so placed to the credit of Alfred Johnson Lumber Company.”

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 32 in its bill of exceptions.

33. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 13.

“I instruct you that it is not the law that merely because [116] the Robert Dollar Company may have honored every draft presented to it by the American National Bank at the instance of the Bank of Bandon prior to December 15, 1913, the Robert Dollar Company was under any obligation to accept the draft in question;



nor is it the law that the American National Bank, a mere agent for collection purposes of the Bank of Bandon, could be held liable for any moneys that the latter bank may have advanced to the Alfred Johnson Lumber Company prior to the time that such draft was received by the American National Bank."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 33 in its bill of exceptions.

34. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 14.

"You are instructed that if you find that it had been the custom of the Robert Dollar Company to honor all drafts drawn by Alfred Johnson Lumber Company, such custom would not operate to render the American National Bank liable for advances made by the Bank of Bandon prior to the date the draft reached the American National Bank, which, according to the evidence, was on the 19th day of December, 1913. Such custom, even if it could be held to be binding upon the Robert Dollar Company, would not be binding upon the American National Bank, for the custom, even if it exists or had existed, established no contractual relation even by implication between the American National Bank and the Bank of Bandon. The liability of the American National Bank, as I have before instructed you, is made to depend solely

upon the proposition whether or not the Bank of Bandon suffered loss or damage subsequent to the 19th day of December, 1913, on account of the failure of the American National Bank to present the draft in question to the Robert Dollar Company for acceptance, and for also having failed to notify [117] the Bank of Bandon and the Alfred Johnson Lumber Company of what action it had taken with reference to the presentation of the draft.”

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 34 in its bill of exceptions.

35. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 15.

“I instruct you that if, from the consideration of the evidence, you shall find that the Bank of Bandon sustained any loss or damage, such loss or damage must relate to the period of time subsequent to the 19th day of December, 1913, for, under the circumstances of this case, it could not be held liable for any moneys that may have been advanced by the Bank of Bandon to the Alfred Johnson Lumber Company prior to the date that the said draft was received by the American National Bank.”

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 35 in its bill of exceptions.

WHEREFORE, the defendant and plaintiff in error prays that said judgment be reversed, and that said District Court of the United States, for the Northern District of California, be ordered to enter a judgment reversing the judgment and decision of the lower court in said cause.

EDGAR C. CHAPMAN,  
WILLIAM P. HUBBARD.

Attorneys for Defendant and Plaintiff in Error.

Dated February 8th, 1916. [118]

Receipt of a copy of the within Assignment of Errors on the 8th day of February, 1916, is hereby admitted.

MASTICK & PARTRIDGE,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 8, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

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*In the District Court of the United States, for the  
Northern District of California, Second Division.*

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,  
Defendant.

**Order Allowing Writ of Error [and Fixing Amount of Bond].**

Upon motion of Edgar C. Chapman, Esq., and William P. Hubbard, Esq., attorneys for defendant, and upon filing a petition for a writ of error, and an assignment of errors:

It is Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby if fixed at five hundred (\$500) Dollars.

Dated this 8th day of February, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Feb. 8, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [120]

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*In the District Court of the United States, for the Northern District of California, Second Division.*

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,  
Defendant.



**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, American National Bank (a corporation), as principal, and Geo. N. O'Brien and D. B. Fuller, *a* sureties, are held and firmly bound unto Bank of Bandon (a corporation), plaintiff above named, in the sum of Five Hundred (500) Dollars, to be paid to the said Bank of Bandon, its successors and assigns, for which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 15th day of February, 1916.

WHEREAS, the above-named defendant, American National Bank (a corporation), has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States, for the Northern District of California (Second Division):

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make [121] good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. N. O'BRIEN,  
D. B. FULLER.

Northern District of California,  
City and County of San Francisco,—ss.

Geo. N. O'Brien and D. B. Fuller, the sureties named in the within and foregoing Bond, being duly sworn, each for himself, and not one for the other, says: That he is a resident and freeholder within the State of California, and that he is worth the sum specified in said Bond, over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. N. O'BRIEN.

D. B. FULLER.

Subscribed and sworn to before me this 15 day of February, 1916.

[Seal] CHARLES EDELMAN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires April 7, 1918.

Approved this 17th day of February, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Feb. 17, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [122]

**[Certificate of Clerk, U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,  
Defendant.

**CLERK'S CERTIFICATE TO RECORD ON  
WRIT OF ERROR.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing one hundred twenty-two (122) pages, numbered from 1 to 122, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing record to writ of error is \$73.20; that said amount was paid by American National Bank, a corporation, defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto

set my hand and affixed the seal of said District Court this 22d day of March, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [123]

[Ten Cent Internal Revenue Stamp. Canceled  
March 22/16. J. A. S.]

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**[Writ of Error.]**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between American National Bank, a Corporation, plaintiff in error, and Bank of Bandon, a Corporation, defendant in error, a manifest error hath happened, to the great damage of the said American National Bank, a Corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit



Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE,  
Chief Justice of the United States, the 17th day of  
February, in the year of our Lord one thousand nine  
hundred and sixteen.

[Seal]

WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,  
District Judge. [124]

Receipt of a copy of the within Writ of Error is  
hereby admitted this 17th day of February, 1916.

MASTICK & PARTRIDGE,  
Attorneys for Defendant in Error.

[Endorsed]: No. 15,831. United States District  
Court for the Northern District of California, Second  
Division. American National Bank, a Corporation,  
Plaintiff in Error, vs. Bank of Bandon, a Corpora-  
tion, defendant in Error. Writ of Error. Filed

Feb. 18, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

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**[Citation on Writ of Error.]**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Bank of London, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern Dis-

trict of California, Second Division, wherein American National Bank, a *Corporation*, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 17th day of February, A. D. 1916.

WM. C. VAN FLEET,

United States District Judge. [125]

Receipt of a copy of the within Citation is hereby admitted this 17th day of February, 1916.

MASTICK & PARTRIDGE,

Attorneys for Defendant in Error.

[Endorsed]: No. 15,831. United States District Court for the Northern District of California, Second Division. American National Bank, a Corporation, Plaintiff in Error, vs. Bank of Bandon, a Corporation, Defendant in Error. Citation on Writ of Error. Filed Feb. 18, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 2765. United States Circuit Court of Appeals for the Ninth Circuit. American National Bank, a Corporation, Plaintiff in Error, vs. Bank of Bandon, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error

to the United States District Court of the Northern District of California, Second Division.

Filed March 23, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

AMERICAN NATIONAL BANK, a Corporation,  
Plaintiff in Error,

vs.

BANK OF BANDON, a Corporation,  
Defendant in Error.

**Order Enlarging Time to File Record on Writ of  
Error and Docket the Cause.**

Good cause appearing therefor, it is Ordered that the plaintiff in error may have to and including the 30th day of March, 1916, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 17, 1916.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals  
for the Ninth Circuit.



[Endorsed]: No. 2765. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to —— File Record Thereof and to Docket Case. Filed Mar. 17, 1916. F. D. Monckton, Clerk. Refiled Mar. 23, 1916. F. D. Monckton, Clerk.



No. 2765

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN NATIONAL BANK (a corporation),  
*Plaintiff in Error,*

VS.

BANK OF BANDON (a corporation),  
*Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

EDGAR C. CHAPMAN,  
WILLIAM P. HUBBARD,  
*Attorneys for Plaintiff in Error.*

Filed this.....day of May, 1916.

MAY 10 1916

F. D. Monckton  
FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.





No. 2765

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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AMERICAN NATIONAL BANK (a corporation),  
*Plaintiff in Error,*

VS.

BANK OF BANDON (a corporation),  
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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### Statement of the Case.

This is an action by the Bank of Bandon, defendant in error to recover the sum of \$5887.78 of and from the American National Bank, plaintiff in error arising out of the failure of the American National Bank to promptly notify the Bank of Bandon of the refusal of the drawee of a draft for \$6,000 that such draft had been dishonored. The case was tried by a jury, and the verdict was against the American National Bank for the full amount sued for.

The proposition of law involved in this case is—  
Was the admitted negligence of the plaintiff in error the proximate cause of the loss sustained by

the defendant in error, or was the loss inevitable by reason of the insolvency of the drawer of the draft in question?

Plaintiff in error asserts that such loss was inevitable and not proximately caused by its negligence.

Defendant in error contends that such loss was solely due to the negligence of plaintiff in error.

The facts in this case are for the most part undisputed.

They may be briefly stated as follows:

The Bank of Bandon organized under the laws of the State of Oregon and engaged in a general banking business at Bandon, Oregon, received, on December 15th, 1913, a draft from the Alfred Johnson Lumber Company in words and figures following to wit:

“\$6,000.00                      Bandon, Ore., Dec. 15, 1913.

At sixty days sight pay to the order of Bank of Bandon, Bandon, Ore. Six Thousand and no/100 Dollars value received and charge the same to the account of Alfred Johnson Lumber Co.

S. P. Bartlett.  
Treas.”

(Record pages 16, 42.)

On the same day, December 15th, 1916, the Bank of Bandon endorsed on the back of said draft, the following:

“Pay to the order of the American National Bank, San Francisco, Cal. All prior endorse-

ments guaranteed. Bank of Bandon, Bandon, Ore.

F. J. Fahy,  
Cashier."

(Record page 16),

and immediately forwarded the said draft to the American National Bank its correspondent conducting a banking business in San Francisco.

The American National Bank received the said draft on December 19th, 1913, and notified the Bank of Bandon that it had been presented to and accepted by the Robert Dollar Company of San Francisco.

As a matter of fact, the draft had not been accepted by the Robert Dollar Company on the 19th of December, 1913, or at any other time. (Record page 17.)

The American National Bank had made a mistake in informing the Bank of Bandon that the draft had been so as aforesaid accepted, and did not discover such mistake until December 29th, 1913. (Record page 28.)

As soon as the American National Bank discovered such mistake it immediately by telegraph and in writing informed the Bank of Bandon that the Robert Dollar Company had refused to honor the draft. (Record page 28.)

But the Bank of Bandon declined to accept the return of the draft claiming that it had on December 15th, credited said draft to the Alfred Johnson Lumber Company and had paid out on said notice

of acceptance nearly the full face of the draft, and that the notification sent it by the American National Bank on the 29th day of December, 1913, of the error of said American National Bank came too late for the Bank of Bandon to save itself from loss, because of the fact that the Alfred Johnson Lumber Company became insolvent shortly after December 29th, 1913. (Record page 29.)

During the period of time between December 15th and December 29th, 1913, the Alfred Johnson Lumber Company, had placed on board the "Grace Dollar" a vessel belonging to Robert Dollar Company about \$12,000 worth of lumber, and the Bank of Bandon claims that it could and would have attached this cargo of lumber if it had known that the draft had not been accepted by the Robert Dollar Company, and thus secured the amount of the draft; but because of the dereliction of the American National Bank it lost its opportunity of levying an attachment upon said cargo of lumber. (Record page 48.)

The cargo of lumber was sold by the Robert Dollar Company for some \$12,000 and that sum was applied in partial satisfaction of a large claim that the Robert Dollar Company had against the Alfred Johnson Lumber Company. But notwithstanding such application the Alfred Johnson Lumber Company was still indebted to the Robert Dollar Company in the sum of \$95,359.46. (Record page 78.)

All of the matters of law and of fact revolve about one proposition namely: Was the proximate



cause of the loss sustained by the Bank of Bandon due to the failure of the American National Bank between December 19th and December 29th to inform the former bank that the draft had not been accepted by the Robert Dollar Company; or, would the Bank of Bandon have sustained the loss in question regardless of such failure, on the part of the American National Bank to so inform said Bank of Bandon?

Upon the strength of its belief that the Robert Dollar Company would honor the draft of the Alfred Johnson Lumber Company, the bulk of the money represented by the draft was paid out by the Bank of Bandon on the order of the Alfred Johnson Lumber Company *before* the draft reached the American National Bank, and *before* it could have been presented for acceptance to the Robert Dollar Company. So that the Bank of Bandon would have lost the face of the draft if the American National Bank had reported promptly the fact of no acceptance of the draft, unless it could and would have subjected sufficient of the assets of the Alfred Johnson Lumber Company to the lien of an attachment. (Record pages 44, 50, 51.)

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### Assignment of Errors.

First. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination as follows:

“Q. Mr. Dollar, what position in reference to the affairs of the Alfred Johnson Lumber Company would the Robert Dollar Company have taken had it known that this particular cargo of cedar had been attached or was about to be attached by the Bank of Bandon?”

Objected to by the plaintiff as irrelevant and incompetent.

Which objection was by the Court sustained, to which ruling the defendant duly excepted.

The Court. What one would testify now in the light of circumstances that have since developed they would have done on a particular occasion is entirely too uncertain, because they might not have been governed by the same considerations at the time at all.”

(Record pages 69 and 70.)

Second. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination wherein he was testifying concerning the dealings of the Robert Dollar Company with the Alfred Johnson Lumber Company and wherein the following question was put to him:

“How did the affairs stand at that date—between those two dates, between December 15th and December 29th?”

Objected to by the plaintiff as immaterial, irrelevant and incompetent, particularly incompetent in that a third party, that is the agent, the collecting agent bank, holding papers for collection cannot protect itself by taking refuge behind the fact that the drawee of a bill of exchange does not hold funds of the drawer.”

(Record page 68.)

Third. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination as follows:

“Q. Now, from that going through the books what did you ascertain as to the general financial status of the Alfred Johnson Lumber Company as to solvency or insolvency?”

Objected to by the plaintiff as immaterial, irrelevant and incompetent and hearsay, not the best evidence, and calling for the conclusion of the witness.

Mr. HUBBARD. As it appeared subsequent to the 15th day of December, 1913?

Which objection was by the Court sustained, to which ruling the defendant duly excepted.”

(Record page 69.)

Fourth. The Court erred in delivering the following instruction to the jury:

“There was testimony given by Mr. Stanley Dollar on the witness stand that he examined the books of the Johnson Lumber Company, and he said it was in an insolvent condition. Now, of course, that evidence is not evidence of insolvency—It means such evidence does not of itself necessarily establish insolvency. Insolvency is a legal status and it is the result of the existence of the conditions which the bankruptcy act has given as constituting insolvency, and which I have read to you. And a witness merely saying that a party is insolvent is therefore stating a mere conclusion; and you will understand that you are not bound from the testimony of that witness alone to determine that the Johnson Lumber Company was insolvent at the time. You have a right to consider the facts which the witness stated, though, independently of that conclu-

sion, together with all of the other evidence in the case in determining whether it was insolvent."

(Record page 126.)

Fifth. The Court erred and misled the jury by giving the following instruction:

"It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man be in shaky circumstances that because he may actually be in insolvent circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor's claim without actually putting him into insolvency."

(Record page 129.)

Sixth. The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that it could have attached the cargo of lumber or other property of the Alfred Johnson Lumber Company, a corporation, between the 19th and 29th days of December, 1913, and that it could by reason of such attachment have saved itself the full sum of Five Thousand Eight Hundred Eighty-Seven Dollars and Seventy-Eight Cents (\$5,887.78), and before you can find that it could, by reason of any such attachment, have saved the said sum of Five Thousand Eight Hundred Eighty-Seven Dollars and Seventy-Eight Cents (\$5,887.78),



you must further find from the evidence that the said Alfred Johnson Lumber Company, a corporation, was solvent during the said time, between said December 19th and 29th, 1913, and that said attachment would not have been dissolved or discharged by the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, within four (4) months after such attachment had been levied. *Jefferson Co. Savings Bank v. Hendrix*, 1 L. R. A. (N. S.) 246; 14 L. R. A. (N. S.) 686; *Brown v. Peoples Bank*, 52 L. R. A. (N. S.) 660, 663; Notes."

(Record page 133.)

Seventh. The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that any loss it may have sustained either from any indebtedness that was due to it from the Alfred Johnson Lumber Company, a corporation, on December 19th, 1913, or for any money that it may have advanced to said Alfred Johnson Lumber Company, a corporation between December 15th and 29th, 1913, was solely, directly and proximately caused by the acts of the defendant, American National Bank, a corporation, in erroneously notifying plaintiff, Bank of Bandon, a corporation, on December 19th, 1913, that said draft had been accepted when it had not, and failing, until December 29th, 1913, to notify plaintiff, Bank of Bandon, a corporation; that the draft had not been accepted; and in order for you to find that such acts on the part of defendant, American National Bank, a corporation, were the sole, proximate and direct causes of such loss to plaintiff, Bank of Bandon, a corpora-

tion, you must further find from the evidence not only that the plaintiff, Bank of Bandon, a corporation, could have attached property of the Alfred Johnson Lumber Company, a corporation, between said December 19th and 29th, 1913, which property would be subject to attachment for said total indebtedness, of Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), and sufficient in amount from which said Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78) could have been realized, but you must also find from the evidence that said Alfred Johnson Lumber Company, a corporation, was, between said dates, solvent, and that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, and that the plaintiff, Bank of Bandon, a corporation, refrained from attaching such property of the Alfred Johnson Lumber Company, a corporation, solely by reason of the fact that defendant, American National Bank, a corporation, had notified plaintiff on December 19th, 1913, that said draft had been accepted."

(Record pages 133 and 134.)

Eighth. The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that before you can render a verdict for plaintiff and against defendant, for any sum whatever, you must find from the evidence, not only that plaintiff has sustained actual damage from some act or omission of defendant, but that such actual damage was directly and proximately caused by defendant's act or omission, and not by

some other act over which defendant had no control.”

(Record page 135.)

Ninth. The Court erred in refusing to deliver to the jury the following instruction:

“You are instructed that even though you should find from the evidence that plaintiff did refrain from attaching the cargo of cedar of the Alfred Johnson Lumber Company, a corporation, by reason of the notification plaintiff received from defendant on December 19th, 1913, that the draft had been accepted; before you can find a verdict for plaintiff, you must further find from the evidence that plaintiff could have kept said cedar under attachment until it could have obtained judgment against said Alfred Johnson Lumber Company, a corporation, and satisfaction of said judgment out of said attached cedar; and you must further find from the evidence that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, or by reason of any other act, within four (4) months after such attachment was levied.”

(Record pages 135-136.)

Tenth. The Court erred in refusing to deliver to the jury the following instruction:

“You are instructed that before you can find for the plaintiff, you must find from the evidence that the defendant by some act of omission or commission on its part caused the Bank of Bandon to change its position towards the Alfred Johnson Lumber Company that it would not otherwise have given except for such act of omission or commission on the part of the

defendant bank, or refrained from taking legal proceedings to protect itself from any advances made by it to the Alfred Johnson Lumber Company; and you must further find from the evidence that such legal proceedings that it would have taken, except for such act of omission or commission on the part of the defendant bank, would have resulted in the plaintiff Bank of Bandon protecting itself by reason of such legal proceedings which it might have taken."

(Record pages 138 and 139.)

Eleventh. The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that if you find that it had been the custom of the Robert Dollar Company to honor all drafts drawn by Alfred Johnson Lumber Company, such custom would not operate to render the American National Bank liable for advances made by the Bank of Bandon prior to the date the draft reached the American National Bank, which, according to the evidence, was on the 19th day of December, 1913. Such custom, even if it could be held to be binding upon the Robert Dollar Company would not be binding upon the American National Bank, for the custom, even if it exists or had existed, established no contractual relation even by implication between the American National Bank and the Bank of Bandon. The liability of the American National Bank as I have before instructed you, is made to depend solely upon the proposition whether or not the Bank of Bandon suffered loss or damage subsequent to the 19th day of December, 1913, on account of the failure of the American National Bank to present the draft in question to the Robert Dollar Company for acceptance, and for also having failed to notify the Bank of Bandon and the Alfred



Johnson Lumber Company of what action it had taken with reference to the presentation of the draft."

(Record pages 141-142.)

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### Points and Authorities.

First. The Court erred in sustaining the objection of plaintiff to the question propounded R. Stanley Dollar, a witness for defendant, on his direct examination as follows:

"Q. Mr. Dollar, what position in reference to the affairs of the Alfred Johnson Lumber Company would the Robert Dollar Company have taken had it known that this particular cargo of cedar had been attached or was about to be attached by the Bank of Bandon?"

Objected to by the plaintiff as irrelevant and incompetent.

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 4.

The COURT. What one would testify now in the light of circumstances that have since developed they would have done on a particular occasion is entirely too uncertain, because they might not have been governed by the same considerations at the time at all."

(Record pages 69 and 70.)

The error consisted in this: The question was intended to establish the fact that the Alfred Johnson Lumber Company was actually insolvent at the very time that it claimed that the Bank of Bandon would have subjected the cargo of cedar to the lien

of its attachment, and that if such attachment had been levied, then the Robert Dollar Company would have thrown the Alfred Johnson Lumber Company into involuntary bankruptcy. This would have had the effect to dissolve the attachment and leave the claim of the Bank of Bandon unsatisfied.

Second. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination wherein he was testifying concerning the dealings of the Robert Dollar Company with the Alfred Johnson Lumber Company and wherein the following question was put to him:

“Q. How did the affairs stand at that date—between those two dates, between December 15th and December 29th?

Objected to by the plaintiff as immaterial, irrelevant and incompetent, particularly incompetent in that a third party, that is the agent, the collecting agent bank, holding papers for collection cannot protect itself by taking refuge behind the fact that the drawee of a bill of exchange does not hold funds of the drawer.”

(Record page 68.)

The error consisted in this. The American National Bank sought by this question to obtain an answer from the witness who was in a position to know, that the Alfred Johnson Lumber Company was hopelessly insolvent during that period of time, and if so it would not have been possible for the Bank of Bandon to have realized on an attachment suit.

Third. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination as follows:

“Q. Now, from that going through the books what did you ascertain as to the general financial status of the Alfred Johnson Lumber Company as to solvency or insolvency?”

Objected to by the plaintiff as immaterial, irrelevant and incompetent and hearsay, not the best evidence, and calling for the conclusion of the witness.

Mr. HUBBARD. As it appeared subsequent to the 15th day of December, 1913?

Which objection was by the Court sustained, to which ruling the defendant duly excepted.”

(Record page 69.)

The error consisted in this. The books of the Alfred Johnson Lumber Company were competent to show whether the company was insolvent, and the refusal of the Court had the effect of producing upon the minds of the jurymen the idea that the question of the insolvency of the Alfred Johnson Lumber Company was a matter of no importance. The prejudice to the plaintiff in error would be in making it appear that the American National Bank would be liable to the Bank of Brandon solely because it was negligent in not sending prompt notice of the dishonor of the draft, when it is the law that the dereliction of the American National Bank must have been the proximate cause of the loss sustained by the Bank of Brandon.

Fourth. The Court erred in delivering to the jury the following instruction:

“There was testimony given by Mr. Stanley Dollar on the witness stand that he examined the books of the Johnson Lumber Company, and he said it was in an insolvent condition. Now, of course, that evidence is not evidence of insolvency—I mean such evidence does not of itself necessarily establish insolvency. Insolvency is a legal status and it is the result of the existence of the conditions which the bankruptcy act has given as constituting insolvency, and which I have read to you. And a witness merely saying that a party is insolvent is therefore stating a mere conclusion; and you will understand that you are not bound from the testimony of that witness alone to determine that the Johnson Lumber Company was insolvent at the time. You have a right to consider the facts which the witness stated, though, independently of that conclusion, together with all of the other evidence in the case in determining whether it was insolvent.”

(Record page 126.)

The error of the foregoing instruction consisted in this. The jury was led to believe that the opinion of Mr. Dollar as to the insolvency of the Alfred Johnson Lumber Company was of no value, even though it was plain from the evidence that by reason of the fact that his company was the heaviest creditor of the Alfred Johnson Lumber Company he was in a position to know that the latter company was hopelessly insolvent on December 15th, 1913, and subsequent thereto, and because of said knowledge the Robert Dollar Com-



pany would have thrown the Alfred Johnson Lumber Company into bankruptcy if the Bank of Bandon had sought to seize by way of attachment the only asset of the Alfred Johnson Lumber Company—the cargo of cedar.

Fifth. The Court erred in delivering to the jury the following instruction:

“It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man be in shaky circumstances that because he may actually be in insolvent circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor’s claim without actually putting him into insolvency.”

(Record page 129.)

The error of the foregoing instruction consisted in this. The jury were told in effect that they could disregard the evidence before them tending to show that the Alfred Johnson Lumber Company was insolvent because of something that might possibly happen by which the insolvent might be relieved.

Sixth. The Court erred in refusing to give the following instruction to the jury:

“You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that it could have attached the cargo of lumber or other property of the Alfred John-

son Lumber Company, a corporation, between the 19th and 29th days of December, 1913, and that it could by reason of such attachment have saved itself the full sum of five thousand eight hundred eighty-seven dollars and seventy-eight cents (\$5,887.78), and before you can find that it could, by reason of any such attachment, have saved the said sum of five thousand eight hundred eighty-seven dollars and seventy-eight cents (\$5,887.78), you must further find from the evidence that the said Alfred Johnson Lumber Company, a corporation, was solvent during the said time, between said December 19th and 29th, 1913, and that said attachment would not have been dissolved or discharged by the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, within four (4) months after such attachment had been levied. *Jefferson Co. Savings Bank v. Hendrix*, 1 L. R. A. (N. S.) 246; 14 L. R. A. (N. S.) 686."

The error of such refusal consisted in this. The law as to defendant's liability was partly contained in this instruction, and if it had been given to the jury, defendant would not have been prejudiced by the lower Courts refusal to give it, and what we have said regarding this instruction applies to each of the instructions asked for by plaintiff in error, next following.

The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that any loss it may have sustained either from any indebtedness that was due to it from the Alfred Johnson Lumber Company, a corpo-

ration, on December 19th, 1913, or for any money that it may have advanced to said Alfred Johnson Lumber Company, a corporation, between December 15th and 29th, 1913, was solely, directly and proximately caused by the acts of the defendant, American National Bank, a corporation, in erroneously notifying plaintiff, Bank of Bandon, a corporation, on December 19th, 1913, that said draft had been accepted when it had not, and failing, until December 29th, 1913, to notify plaintiff, Bank of Bandon, a corporation, that the draft had not been accepted; and in order for you to find that such acts on the part of defendant, American National Bank, a corporation, were the sole, proximate and direct causes of such loss to plaintiff, Bank of Bandon, a corporation, you must further find from the evidence not only that the plaintiff, Bank of Bandon, a corporation, could have attached property of the Alfred Johnson Lumber Company, a corporation, between said December 19th and 29th, 1913, which property would be subject to attachment for said total indebtedness of five thousand eight hundred and eighty-seven dollars and seventy-eight cents (\$5,887.78), and sufficient in amount from which said five thousand eight hundred and eighty-seven dollars and seventy-eight cents (\$5,887.78) could have been realized, but you must also find from the evidence that said Alfred Johnson Lumber Company, a corporation, was, between said dates, solvent, and that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, and that the plaintiff Bank of Bandon, a corporation, refrained from attaching such property of the Alfred Johnson Lumber Company, a corporation, solely by reason of the fact that defendant, American National Bank, a corporation, had notified plaintiff on Decem-

ber 19th, 1913, that said draft had been accepted."

The Court erred in refusing to give the following instruction:

"You are instructed that before you can render a verdict for plaintiff and against defendant, for any sum whatever, you must find from the evidence, not only that plaintiff has sustained actual damage from some act or omission of defendant, but that such actual damage was directly and proximately caused by defendant's act or omission, and not by some other act over which defendant had no control."

The Court erred in refusing to give the following instruction:

"You are instructed that even though you should find from the evidence that plaintiff did refrain from attaching the cargo of cedar of the Alfred Johnson Lumber Company, a corporation, by reason of the notification plaintiff received from defendant on December 19th, 1913, that the draft had been accepted; before you can find a verdict for plaintiff, you must further find from the evidence that plaintiff could have kept said cedar under attachment until it could have obtained judgment against said Alfred Johnson Lumber Company, a corporation, and satisfaction of said judgment out of said attached cedar; and you must further find from the evidence that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, or by reason of any other act, within four (4) months after such attachment was levied."



The Court erred in refusing to give the following instruction:

“You are instructed that before you can find for the plaintiff, you must find from the evidence that the defendant by some act of omission or commission on its part caused the Bank of Bandon to change its position towards the Alfred Johnson Lumber Company, and by such act of the defendant, plaintiff either gave credit to the Alfred Johnson Lumber Company that it would not otherwise have given except for such act of omission or commission on the part of the defendant bank, or refrained from taking legal proceedings to protect itself from any advances made by it to the Alfred Johnson Lumber Company; and you must further find from the evidence that such legal proceedings that it would have taken, except for such act of omission or commission on the part of the defendant bank, would have resulted in the plaintiff Bank of Bandon protecting itself by reason of such legal proceedings which it might have taken.”

The Court erred in refusing to give the following instruction:

“You are instructed that if you find that it had been the custom of the Robert Dollar Company to honor all drafts drawn by Alfred Johnson Lumber Company, such custom would not operate to render the American National Bank liable for advances made by the Bank of Bandon prior to the date the draft reached the American National Bank, which, according to the evidence, was on the 19th day of December, 1913. Such custom, even if it could be held to be binding upon the Robert Dollar Company, would not be binding upon the American National Bank, for the custom, even if it exists or had existed, established no contractual rela-

tion even by implication between the American National Bank and the Bank of Bandon. The liability of the American National Bank, as I have before instructed you, is made to depend solely upon the proposition whether or not the Bank of Bandon suffered loss or damage subsequent to the 19th day of December, 1913, on account of the failure of the American National Bank to present the draft in question to the Robert Dollar Company for acceptance, and for also having failed to notify the Bank of Bandon and the Alfred Johnson Lumber Company of what action it had taken with reference to the presentation of the draft."

All of the instructions which plaintiff in error asked the Court to deliver to the jury on behalf of the plaintiff in error and which have just been referred to contained the entire law of the case as shown by the evidence; for, there was but one proposition of law involved, and that was: *what was the immediate, direct, and proximate cause of the loss sustained by the defendant in error?* And such proposition of law was dependent upon the presentation of the fact to the jury under proper instructions that there were no available assets of the Alfred Johnson Lumber Company which the Bank of Bandon could have seized and retained by means of an attachment suit in satisfaction of its claim.

There is no question but that the Alfred Johnson Lumber Company was insolvent shortly after the draft reached the American National Bank, for the amended answer of the Bank of Bandon admits and charges "that shortly after said 29th day of December, 1913, the said Alfred Johnson

Lumber Company a corporation became and remained, and ever since has been and still is, insolvent and unable to pay its debts." (Record pages 18 and 19.) And because of the insolvency of the Alfred Johnson Lumber Company shortly after December 29th, 1913, the Bank of Bandon asserts that it was unable to save itself from loss by means of attachment or otherwise. (Record pages 18 and 19.)

As proof of the correctness of this contention of the Bank of Bandon, it is only necessary to examine the composition agreement upon the part of the creditors of the Alfred Johnson Lumber Company, which was prepared within two weeks following the 29th day of December, 1913, showing that it owed approximately \$147,000 and had not a single available asset. (Record pages 78, 79, 80.)

This being the financial condition of the Alfred Johnson Lumber Company *subsequent to December 29th*, it follows that unless its financial affairs were considerably better on December 19th, 1913, then it was insolvent on this latter date as well. And if it was bankrupt on December 19th, 1913, then it is too plain for argument that the Bank of Bandon would have been in no better position to save itself from loss than it was shortly after December 29th, 1913.

And right here it might be well for this Court to consider that at the very time that the Bank of Bandon claims it was prevented from securing itself from loss of said draft amounting to \$6000.00, the

Alfred Johnson Lumber Company was indebted to said bank in the further sum of \$5000. This clearly appears in and by the composition agreement of the creditors of said lumber company. (Record page 78.)

An examination of the record discloses the fact that no change in its affairs had taken place between the two dates referred to materially affecting its status. The only difference between the condition of the Alfred Johnson Lumber Company on December 15th from what it was on December 29th was this: On the former date it had \$12,000 worth of assets, a cargo of cedar aboard the "Grace Dollar" a vessel belonging to the Robert Dollar Company, the heaviest creditor of the Alfred Johnson Lumber Company. (Record page 79.) This was the only asset of the company. Against this lone asset it owed every item contained in the composition agreement, aggregating as we have said, over \$147,000 plus \$12,000, the value of the cargo. The Robert Dollar Company having sold the cargo and reduced its claim against the Alfred Johnson Lumber Company by that amount. So, that instead of the Alfred Johnson Lumber Company being indebted to the Robert Dollar Company in the sum of \$95,359.46, only as per the composition agreement it owed the Robert Dollar Company, approximately \$107,000 before the sale of the cargo of cedar. (Record pages 78 and 79.)

In other words, on December 15th, 1913, or shortly thereafter, the only asset that the Alfred Johnson



Lumber Company had was a \$12,000 cargo of cedar, which was appropriated by one creditor, leaving the company without any assets at all and liabilities aggregating over \$147,000. If, on December 15th, 1913, the Alfred Johnson Lumber Company owed approximately \$147,000 and \$12,000 or \$159,000 with only one available asset of the value of \$12,000 was not the company hopeless bankrupt on that day? Was its status materially altered any on December 29th, when it owed \$147,000 and had *no* asset?

There is no escape from the proposition that notwithstanding the admitted negligence of the American National Bank, the Bank of Bandon did *not lose a dollar of its money by reason of such negligence.*

The Bank of Bandon had paid out nearly the full face of the draft, as we have said, before the 19th day of December 1913, and before any negligence upon the part of the American National Bank had taken place, and would surely have been unable to have saved itself from loss by means of an attachment levied on the 19th day of December, 1913, or at any other time in the month of December, 1913.

We are aware that the witness Kronenberg, the president of the Bank of Bandon, testifies positively that he would have attached the \$12,000 cargo of cedar whether he knew the lumber company was solvent or insolvent, except for the negligence of the American National Bank in failing to notify his

bank of the dishonor of the draft in question, but as a sensible banker he would have done nothing of the kind. (Record page 48.) He must have known that the cargo of lumber was aboard the "Grace Dollar". He must have known that the Alfred Johnson Lumber Company was largely indebted to the Robert Dollar Company. He surely knew that the cargo of lumber could not be attached on the "Grace Dollar" without the knowledge of the Robert Dollar Company. He could not have believed that the Robert Dollar Company would stand idly by, and allow one creditor to seize the only asset the lumber company had and appropriate it to the liquidation of its own claim. He must have known that the Robert Dollar Company would have thwarted the efforts of his bank by throwing the Alfred Johnson Lumber Company into bankruptcy. That such action would have brought about the dissolution of the attachment.

The very fact that the Robert Dollar Company appropriated the whole cargo in partial liquidation of its own claim, proves that it was sensible enough to look out for its own interests, and it is simply inconceivable that it would have ceased to do so, merely because the Bank of Bandon had brought an attachment suit.

Counsel for plaintiff in error, therefore, contend that there is no question but that the course above indicated is the one that any sensible business man would have pursued.

But in addition to this the plaintiff in error sought to show that the Robert Dollar Company was willing to prove that it would have taken the course above indicated and would have prevented the Bank of Bandon from seizing the cargo of lumber for its own exclusive benefit, but Judge Van Fleet refused to permit the witness, Stanley Dollar of the Robert Dollar Company to make any statement as to what the action of his company would have been in the premises. (Record pages 69-70.)

This was palpable error. The witness Stanley Dollar had a right to say what his company would have done under the circumstances.

The witness Kronenberg of the Bank of Bandon was accorded that privilege without objection.

We cannot see why Stanley Dollar should not have been permitted to exercise the same privilege given to Mr. Kronenberg and tell us what his company would have done.

Counsel for plaintiff in error insist therefore, that the American National Bank could not prove its case because of the rulings, comments and instructions of the lower Court on this branch of the case, and in consequence thereof the jury was misled and misdirected to the prejudice of the American National Bank.

The principal point in the case from the standpoint of the American National Bank was the insolvency of the Alfred Johnson Lumber Company

at the time the draft in question was drawn. And notwithstanding the fact that the record shows conclusively that the Alfred Johnson Lumber Company was hopelessly insolvent Judge Van Fleet seemed to make use of every occasion to minimize its importance.

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#### AUTHORITIES.

*Notwithstanding the collecting bank may have been negligent, yet, if by reason of the insolvency of the person liable upon the paper, an action against such person would have afforded no protection by reason of such insolvency, the collecting bank can not be held in damages.*

The following authorities support this principle:

Jefferson County Savings Bank v. Hendrix,  
1 L. R. A. (n. s.) 246, and case note;

Jefferson County Savings Bank v. Hendrix,  
14 L. R. A. (n. s.) 686;

Brown v. Peoples Bank, 52 L. R. A. (n. s.)  
608, note at page 660, "Necessity of proving damage".

First National Bank v. Buckhannon Bank,  
80 Md. 275, 27 L. R. A. (o. s) 332;

Stowe v. Bank of Cape Fear, 14 N. C.  
(3 Dev. L.) 408;

First National Bank v. Fourth National  
Bank, 6 C. C. A. 183, 56 Fed. 967;



- Givan v. Bank of Alexandria, 47 L. R. A. (o. s.) 270;  
 Crawford v. Louisiana State Bank, 1 Mart. (n. s.) 214;  
 Second National Bank v. Bank of Alma, 99 Ark. 386, 138 S. W. 472;  
 Noble v. Doughten, 72 Kan. 336, 3 L. R. A. (n. s.) 1167;  
 Industrial Trust, Title and Sav. Co. v. Weakley, 103 Ala. 458, 49 Am. St. Rep. 45;  
 Citizens Bank v. Houston, 98 Ky. 139, 32 S. W. 397.

Having shown that the Alfred Johnson Lumber Company was actually bankrupt when it drew its draft upon the Robert Dollar Company on the 15th day of December, 1913, and having shown then that if the Bank of Bandon had commenced an attachment suit against the cargo of the "Grace Dollar" at any time during the month of December, 1913, such attachment would have caused the Robert Dollar Company to have forced the Alfred Johnson Lumber Company into involuntary bankruptcy, it follows that the Bank of Bandon would have gained no advantage or preference by reason of such attachment.

Under these circumstances the admitted negligence of the American National Bank did not contribute proximately or remotely to the loss sustained by the Bank of Bandon.

The judgment should, therefore, be reversed.

Dated, San Francisco,

May 15, 1916.

Respectfully submitted,

EDGAR C. CHAPMAN,

WILLIAM P. HUBBARD,

*Attorneys for Plaintiff in Error.*

United States

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Circuit Court of Appeals

Ninth Circuit

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AMERICAN NATIONAL BANK, a corporation,  
Plaintiff in Error,  
vs.

BANK OF BANDON, a corporation,  
Defendant in Error.

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Brief for Defendant in Error

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MASTICK & PARTRIDGE,  
JOHN S. PARTRIDGE,  
*Attorneys for Defendant in Error.*

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Filed this.....day of August, 1916.

**Filed**

FRANK D. MONCKTON, Clerk.

By .....  
Deputy Clerk.

OCT 19 1916

**F. D. Monckton,**  
Clerk.

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No. 2765

IN THE  
**United States Circuit Court  
of Appeals**  
NINTH CIRCUIT

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AMERICAN NATIONAL BANK, a corporation,	} Plaintiff in Error,

vs.

BANK OF BANDON, a corporation, Defendant in Error.	}

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**BRIEF FOR DEFENDANT IN ERROR**

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I.

THE FACTS.

For about two years prior to December 15, 1913, the Alfred Johnson Lumber Company had been in the habit of discounting drafts with the Bank of Bandon on the

15th of each month. These drafts were to meet mill pay-rolls, and were drawn on the Robert Dollar Company of San Francisco. The only correspondent of the Bank of Bandon in the latter city was the plaintiff in error. These drafts were always sent to the American National Bank for collection, upon the understanding that, as to any item over \$500.00, the latter should wire non-acceptance, in the event that a draft was refused payment. However, the drafts had always been paid previous to the one in controversy.

On the 15th of December, 1913, in accordance with their custom, the Lumber Company drew its draft at sixty days for \$6,000.00. The defendant in error credited this sum in regular course, and immediately sent the draft to plaintiff in error.

On the 19th of December, the American National notified the Bank of Bandon that the paper had been accepted by the Dollar Company. This, however, was not the fact. The draft had been refused.

Between the 15th and the 19th of December, the Bank of Bandon had advanced to the Lumber Company the sum of \$4,287.78 upon the draft.

The first intimation that the Bank of Bandon had of the non-acceptance was a telegram on December 29th, at which time they had paid out the full amount sued for.

The Lumber Company had on the docks at Bandon a cargo of white cedar, consigned to the Dollar Company. This went on board the vessel from the 21st to the 24th of December, the vessel sailing on the latter date. The value of this cargo was from \$10,000.00 to \$12,-

000.00. The money advanced upon the draft was for pay-rolls in the manufacture of this cargo, and the draft itself was drawn against it. The cargo was received and sold by the Dollar Company.

The net result was:

1. The Bank of Bandon paid the labor for the production of the cedar, in reliance upon the draft.
2. It lost the only opportunity it had to protect itself by the attachment of this cargo.
3. The drawee received, and got the benefit of this very cargo.

When the draft was refused, the American National did not protest at all. In fact, when they notified the Bank of Bandon on the 29th that the draft was not accepted, they advised the return of the paper without protest. In answer to this, Mr. Topping, attorney for the Bank of Bandon, wired that they had no lien, and asking for advices. The protest for non-acceptance was then made in San Francisco on December 30th. On the same day, the American National wired that the Dollar Company claimed to have no cargo to cover, and that the latter company had thrown the Johnson Company into involuntary bankruptcy, both of which statements appear to have been contrary to the facts. On the 31st, the American National wrote that they expected to suffer the penalty, if it was the cause of the loss. The American National, further, by wire and letter, requested the Bank of Bandon to take all legal steps to protect, but it was too late, as there was nothing to attach after the white cedar had been shipped.

The statement which the Johnson Company had given

to the Bank of Bandon showed that they were solvent, and the Bank of Bandon had no knowledge of any excessive indebtedness to the Dollar Company. It is apparent, therefore, that the Bank of Bandon had the right to expect that the usual custom would be followed, namely, that a pay-roll draft against cargo on the dock would be accepted, and if not, that their correspondent, the plaintiff in error, would promptly notify them, and attend to protest and notice.

Moreover, after the 29th, the attorney for the Bank of Bandon made a full investigation, and could not find any property which would pay for an attachment. The lumber which was on hand would hardly pay freight to San Francisco; the stumpage contracts were actually worth less than the market; and the mill itself was sold under foreclosure for less than the amount of the mortgage which covered it at the time of the transaction in question.

## II.

The rulings complained of were based upon the *assumption*, that if defendant in error had attached the white cedar, the Johnson Lumber Company would have been thrown into bankruptcy. This assumption is:

1. Highly speculative.
2. It carries with it the assumption that, if the Bank of Bandon had attached the cedar, the Dollar Company would have instituted bankruptcy proceedings, and thus lost a cargo worth twice the amount of the Bank of Bandon's claim.
3. It leaves to speculation the amount which the



Bank of Bandon would have got out of the cedar even if bankruptcy had followed an attachment.

### III.

#### THE INSOLVENCY OF THE MAKER OF A NEGOTIABLE INSTRUMENT DOES NOT EXCUSE PROMPT PROTEST AND NOTICE.

1. Section 3155 of the Civil Code of the State of California enumerates the cases in which notice of dishonor is excused, and insolvency is not one of them.

2. Sections 3224 to 3228 of the same Code provide that notice of dishonor of a foreign bill of exchange can be given only by notice of its protest. These sections also enumerate the facts excusing protest, of which bankruptcy is not one.

3. It is, of course, elementary, and statutory in California, that protest must be noted on the day of presentment, or the next business day, and that failure to protest exonerates the drawer. The act of the plaintiff in error, therefore, released the Johnson Lumber Company from all liability.

4. We beg to submit the reasoning of the Court of Appeals for the Seventh Circuit, in *Phipps v. Harding*, 70 Fed. 468, as conclusive of this question:

"We are thus brought to the question whether the known insolvency of the maker at the time of the execution of the note, and the fact that the plaintiffs in error were directors, constituting a majority of the board of

directors, of the maker of the note, obviate the necessity of presentment of the note for payment, and the giving of seasonable notice of dishonor. The contract of the parties was conditional. It was, as we have seen, that if, upon due demand, the note should not be paid by the corporation according to its tenor, they would compensate the holder, or a subsequent indorser who is compelled to pay, provided the requisite proceedings for dishonor were duly taken. That there should be demand of payment and notice of dishonor were terms incorporated into this contract. *Rothchild v. Currie*, 1 Adol. & E. (N. S.) 43. The reason of the condition imposed by the law, doubtless, was that the indorser might take prompt measures for his security, and the law presumed injury from want of notice of dishonor. This presumption is certainly not refuted by proof of the solvency of the maker evidencing that no injury resulted from want of notice to the indorser. It is said, however, that insolvency known to the indorser dispenses with the necessity of notice, because nothing could be lost by default of demand and notice. We are not prepared to concur in the conclusion of fact. We have said that the insolvency of the maker, when no possible loss could result to the indorser from want of notice, will not excuse failure to advise of dishonor. Certainly, in the case of insolvency notice is more essential, that the party to be charged may take prompt measures for his security. The insolvency of the maker might possibly affect the sufficiency of indemnity, but it would not necessarily result in a total failure of redress. That would be dependent

upon the extent of the insolvency. There have been cases invested with peculiar equities, in which courts have sought to evade this wholesome rule of the common law, and in which they have permitted evidence of no injury to excuse notice. We are not prepared to follow a rule that will tend to confusion in commercial law in order to relieve a supposed hardship. We concur with the Supreme Court of Massachusetts in *Farnum v. Fowle*, 12 Mass. 89, 92, that the 'hardship, if any, arises from a fluctuation of opinion and an uncertainty as to rules, and seldom from an inflexible adherence to them, because, when it is once known that exactness in the performance of duty is to be required, parties will adapt themselves to such a state of things, and be always diligent and punctual to avail themselves of contracts'. And we concur with Mr. Daniel (*Daniel, Neg. Inst.*, Sec. 1134) that it is 'a total misconception of the obligation of an indorser to place his liability at all upon any question involving the pecuniary circumstances of his principal'. Hardship is more likely to happen from speculation of courts and juries in the determination of the question of fact whether injury has or not resulted from want of notice than from strict adherence to the law and to the terms of the contract. The better opinion is, and, as we think, the settled doctrine of this country is, *that insolvency is no excuse for failure of notice of dishonor*. *French's Ex'x v. Bank*, 4 Cranch, 141; *Wilson v. Senior*, 14 Wis. 380; *Sanford v. Dillaway*, 10 Mass. 52; *Far-*

num v. Fowle, 12 Mass. 89; Bank v. Ayers, 16 Pick 392; Bank v. Spencer, 6 Metc. (Mass.) 308."

We respectfully submit that the judgment should be affirmed.

MASTICK & PARTRIDGE,  
JOHN S. PARTRIDGE,  
*Attorneys for Defendant in Error.*



IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN NATIONAL BANK (a corporation),  
*Plaintiff in Error,*

VS.

BANK OF BANDON (a corporation),  
*Defendant in Error.*

## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

EDGAR C. CHAPMAN,

WILLIAM P. HUBBARD,

Mills Building, San Francisco,

*Attorneys for Plaintiff in Error  
and Petitioner.*

**Filed** this 14 day of April, 1917.

**APR 17 1917**

**FRANK D. MONCKTON, Clerk.**

**F. D. Monckton,**

By Clerk Deputy Clerk.



No. 2765

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit.

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AMERICAN NATIONAL BANK (a corporation),	}
<i>Plaintiff in Error,</i>	

VS.

BANK OF BANDON (a corporation),	}
<i>Defendant in Error.</i>	

---

## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

Under the rulings of the lower Court the Bank of Bandon was allowed to allege and prove that The American National Bank was negligent; that such negligence was the proximate cause of its loss; that its loss consisted of moneys (\$1600.42) paid out after notice of the acceptance of the draft in question, and also for moneys (\$4287.36) advanced be-

fore December 19, 1913, in anticipation that the draft would be accepted.

The American National Bank, while admitting its negligence in sending to the Bank of Bandon misinformation as to the acceptance of the draft, claimed the right to prove that such negligence only rendered The American National Bank liable, not for *all* of the moneys paid out, but only for the loss of such moneys as the Bank of Bandon was prevented from reclaiming, amounting to \$1600.42, or the difference between \$5887.78 the sum sued for, and \$4287.36. In order to defend this action it was only necessary for the American National Bank to show:

1st. That the Alfred Johnson Lumber Company was virtually bankrupt between the 19th and 29th days of December, 1913. The Bank of Bandon concedes that it was insolvent after the last mentioned date; and

2nd. That if an attachment suit had been commenced by the Bank of Bandon after the draft had been dishonored by the Robert Dollar Company, the result would have been to throw the lumber company into bankruptcy, thereby preventing a recovery of but an insignificant portion of the moneys theretofore paid out and which the draft was intended to cover.

As to the first proposition the evidence is overwhelming to the effect that the lumber company was insolvent. (Record pages 78-80.) The mere statement of its assets and liabilities, without any other



evidence, establishes that fact, for on December 19th the lumber company had liabilities aggregating more than \$147,000.00. Its only asset was a small cargo of lumber of the value of \$12,000.00. It had no credit. It could get no more money from the Robert Dollar Company, nor could it get any funds from the Bank of Bandon, except upon the draft in question. Nor is there any evidence that it had any source of income whatsoever. These matters of themselves stand out in the record with great prominence, and are sufficient in and of themselves to show that a judgment, in favor of the Bank of Bandon, or any other large creditor, against the lumber company, would have resulted in bringing that company into the bankrupt Court.

But, in order to make a better defense The American National Bank was willing to go a step further and prove by the Robert Dollar Company, that as a creditor of the lumber company, to the extent of more than \$107,000.00, it would have forced the latter company into a court of bankruptcy, if any attempt had been made by the Bank of Bandon to obtain a preference by means of an attachment suit. It is incredible that any sane person, similarly situated, would have acted differently. Nor would it be difficult to believe that all of the principal creditors of the lumber company would have taken steps to protect their interests, if the Robert Dollar Company had been indifferent in that respect. And then, what would have happened? It would not have been possible for the Bank of Bandon to

have subjected the little cargo of cedar, amounting only to \$12,000.00, to its own claim; and if the cargo of cedar could not have been so seized, how is it possible to hold that the moneys advanced upon the draft, prior to the time the Robert Dollar Company ever saw it, could be reclaimed by the Bank of Bandon?

The lower Court, however, while deeming it perfectly proper to allow the Bank of Bandon to state that it would have protected itself by means of an attachment suit, denies to The American National Bank the correlative right to produce evidence to the effect that it likewise would have protected itself by blocking such action by the Bank of Bandon by means of bankruptcy proceedings. (Record pages 62, 68, 82.)

The attitude of the lower Court in the premises served to prejudice the rights of The American National Bank in the eyes of the jury. The jury was impressed with the idea that the question of the insolvency of the lumber company was of no importance, and that it did not make a particle of difference what the proximate cause of the loss was. The jury lost sight of the principle of law involved in the case, namely, that the liability of The American National Bank is based solely upon its negligence, by which the Bank of Bandon lost its money.

The American National Bank, if liable at all to the Bank of Bandon, is liable only in damages caused by its negligence, but if, in spite of its negligence, the Bank of Bandon would have lost the

moneys so advanced by it in any event, then it is too plain for argument that The American National Bank is not responsible for the loss sustained by the Bandon Bank, for it must always be borne in mind that this cause of action must establish the proximate cause of the loss sustained by the Bank of Bandon, for, if, notwithstanding the conduct of The American National Bank in giving to the Bank of Bandon misinformation concerning the acceptance of the draft, the condition of the Bank of Bandon would have been precisely the same, this action cannot be maintained.

A great deal has been said in the brief of counsel concerning the principles of the law merchant, and the liability of endorsers, and those who place their names on commercial paper, and certain sections of the Civil Code have been referred to, but they throw no light upon the underlying principles of law which govern the rights of the parties in this case. Those principles are not to be found by resort to the law merchant alone, but they are to be found in those cases where the courts have had occasion to consider damages that result from negligence of a collecting bank in handling commercial paper for other banks.

We repeat the argument set forth in our brief to the effect that, all of the authorities are unanimous upon the proposition that, notwithstanding a collecting bank may be negligent in handling a bill of exchange, yet, that when recovery is sought against such negligent bank by a party to the exchange, the amount of such recovery is limited to

the *actual damage* sustained, and if there could be no recovery upon the paper, anyway, by reason of the insolvency of the party against whom recovery might be had, but for such negligence, then there can be no recovery against the negligent bank.

This is clearly expressed in 3 Ruling Case Law, Sec. 260, where it is said:

“It is a fundamental principle that negligence on the part of an agent in the transaction of the business of his principal will not render him liable for damages unless his negligence results in an actual injury to his principal. And as a corollary the damages recoverable by a principal for the negligence of his agent are the actual loss which the principal has suffered. So it would seem to follow that a recovery for the negligence of a collecting bank resulting in a failure to make the collection should be limited to the actual loss suffered by its customer. So it has been held that where a bank receives a cashier’s check on the drawee bank for collection, it is not necessarily liable for the face value of the check on account of its negligence in presenting the check for payment, as where the drawee bank becomes insolvent after the negligence of the collecting bank, and there are assets in the hands of a receiver for distribution from which a dividend for creditors has been declared. And where the collecting bank has been negligent in the collection of paper entrusted to it, the customer must allege and prove the amount of damages he has suffered. On the other hand this is authority for the position that the onus is on the bank when sued for neglect, in failing to give notice of demand and payment, and of protest of the note intrusted to it for collection, to show that its principal has incurred no damage from its neglect.”



This brief statement of the law is supported by authorities from many jurisdictions. They were all cited in our brief. (Pages 28-29.)

The same conclusion is succinctly stated in 5 Cyc., 511:

“The measure of damage is the actual loss resulting from the collector’s omission of duty.”

This statement is also supported by ample authorities.

So, in this case, by reason of the attitude of the judge of the trial Court, by reason of the rulings upon the offered evidence, and by reason of the instructions given and refused, all as pointed out in our brief, and herein, plaintiff in error was prevented from showing that notwithstanding it was, in the first instance, negligent in handling the draft, yet, that the loss of defendant in error would have occurred anyway, on account of the actual insolvency and bankruptcy of the Johnson Company. And furthermore that the loss of at least \$4287.36 was occasioned solely and only by the act of the Bank of Bandon in paying out that sum, before the draft ever reached the plaintiff in error.

The practical effect of the decision is to hold plaintiff in error responsible for the full loss in the very teeth of this law and the actual facts of this case.

In this connection we ask the Court to review what was said in

Hendrix v. Jefferson County Savings Bank,  
14 L. R. A. (N. S.) 687.

“As to the liability of a collecting bank for negligence in presenting or giving notice of dishonor of paper in its hands for collection, there has been much discussion in the courts. Even so great an authority as the pathfinder in American law, Chief Justice Marshall, remarked that ‘by failing to demand payment in time the bank would make the bill its own, and would become liable \* \* \* for its amount.’ (Bank of Washington v. Triplett, 1 Pet. 25, 31, 7 L. Ed. 37, 40); but that case was decided on another principle, and our own court in an early case, which has become a leading one, shows that the learned Chief Justice ‘was not preparing to discuss the general rule,’ and that the facts of that case did not call for the remark, and held that in such a case the collecting bank is liable only for the actual loss which the owner of the bill sustained by reason of the negligence of the collecting bank. Bank of Mobile v. Huggins, 3 Ala. 206, 215, et seq. That was a case in which it was claimed that the failure to give notice had discharged the indorser, and the Court held that the discharge of a solvent party is not an actual loss when there are other solvent parties bound, and that it rests with the principal to show, before he is entitled to recover the amount of the note as damages, that the parties who remain are unable to pay. *Id.*, headnote 6, and pages 220, 221.

When the present case was before this Court at a previous term, the court said: ‘It by no means follows, from the negligent failure of the bank to collect the check, or its negligent failure to give the owner timely notice of the dishonor of the paper, whereby he is denied fruitful opportunity to collect it himself, that the owner loses the demand for which the check was given, or even any part of it,’ etc.; and also: ‘It will, therefore, not suffice for the owner to hail the collector bank into court and

implead that—you took this check to collect it, you did not do your duty in that regard, and of consequence the check was not collected; therefore the check is yours, and the amount of it in money is mine, and in your hands for me, and you must pay me that amount.—Hence it was held that counts 7 and 8 were ‘so wanting in averments of damages suffered by plaintiff as to state no cause of action.’ *Jefferson County Savings Bank v. Hendrix*, 147 Ala. 670, 1 L. R. A. (N. S.) 246, 39 So. 295, 296. In the case as presented to the Court now, said counts 7 and 8 were remodeled so as to state that ‘the assets of said bank are insufficient to enable him to collect therefrom, by dividends or otherwise, the full amount of said check, with interest,’ and that he will lose a large part, to wit, \$1,000.

This case is also reported in 1 L. R. A. (N. S.) 246, and the annotator submits an extended note, citing many cases to the effect that the burden is upon the plaintiff to allege and prove what damage he has suffered by reason of the negligence of the collecting bank, and particularly calling attention to the fact that the remark in *Daniel on Negotiable Instruments* ‘that loss is prima facie the amount of the bill or note’, etc., is not supported by the authorities cited by that author. In the case of *Allen v. Suydam*, 17 Wend. 368, the supreme court of New York held that, where the agent was guilty of negligence in regard to presentment and notice, he was liable in damages to the full amount of the bill; but our own court criticised that case and refused to follow it, saying: ‘It is difficult to conceive how a mere agent, who is intrusted with the paper only for one specific purpose, in no ways coupled with any interest, can be held to proof of those circumstances on which its value or its worthlessness depend.’ *Bank of Mobile v. Huggins*,

3 Ala. 219. Subsequently that case went to the court of errors and appeals of New York, and was reversed on the question of damages; the court holding that the jury should have been instructed 'to find only such damages as they should, from the evidence, believe it probable the plaintiffs might have sustained by the delay'. *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555, 563.

It is true that it is stated in *Sutherland on Damages* that, 'if there is negligent delay by an agent in presenting a bill for acceptance, and the antecedent parties, though not thereby discharged from their legal liability, in the meantime become insolvent, the amount of the bill is *prima facie* the loss' (p. 2372); and there are authorities which use this expression. It is also true that the writer of the notes to *Sutherland on Damages* indicates that he agrees with the dissenting opinion of Senator Verplanck in *Allen v. Suydam*, 20 Wend. 334, 32 Am. Dec. 555; 3 *Sutherland, Damages*, 3d ed., p. 2372, Sec. 775, note 3; *Merchants State Bank v. State Bank*, 94 Wis. 444, 69 N. W. 170; *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 382, 79 N. W. 859. It is probable that the word 'insolvent' in these authorities is used in its ordinary sense, to show that nothing can be collected from the parties remaining on the bill, so that the principle would not apply to a case where the estate of the party liable is in the hands of the bankrupt court, with some funds to be administered. However, in accordance with the weight of authority, and especially in view of the positive position taken by our own court, we hold that the measure of damages is the actual loss sustained, and that it is a part of the plaintiff's case to allege and prove the amount of loss. We understand this to be the effect of the decision in this case when previously here; and



the amended counts alleging the insufficiency of the assets of the bankrupt estate should have been sustained by proof.

Again, even if the *prima facie* theory should be adopted, yet it would not change the result in this case, because the evidence shows as a matter of fact that there were assets of the bankrupt bank subject to the payment of this check, that dividends to the amount of 44 per centum had been declared, and still there were assets. The payee of the check was still the owner of it, and entitled to that dividend and any others that might follow. He should have gone on and proved what would probably be the entire dividend to which he would be entitled. Certainly the Court could not say that he was entitled to the full face value of the check, when, for all that appears from the evidence, he may have already collected 44 per cent of it, and there was no evidence before the Court from which it could ascertain what the amount of the actual damage was.

It cannot be said that it was the duty of the collecting bank to prove up the claim in bankruptcy and collect the dividends. It was agent only to present and collect the claim from the bank, and when it presented it, and gave notice of its dishonor, and charged it back to the drawer, the paper was the property of the drawer, and no one else could file it in the bankrupt court. 3 Am. & Eng. Enc. Law, 2d ed., p. 817. Neither is there any force in the contention that the defendant made the check its own because it did not return it to the plaintiff, as the evidence shows that the check was in the possession of the receiver in bankruptcy."

Again, in a note to Jefferson County Savings Bank v. Hendrix, 1st L. R. A., page 246, it is said:

“The measure of damages for the neglect of a collecting bank to fix the liability of an indorser by notice of demand and non-payment is said, in *Borup v. Nininger*, supra, to be the face of the note; but the court adds: ‘The plaintiff must make out the insolvency of the maker, and the solvency of the indorser, discharged by the act of the defendants. The defendants may mitigate the damages by showing either the solvency of the maker, the insolvency of the indorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff; the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff’s damages.’ Citing *Sedgw., Damages*, 340 et seq.; *Howard v. Garner*, 3 Sandf. 179; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Allen v. Merchants Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555. To the same effect is *West v. St. Paul Nat. Bank.*, 54 Minn. 466, 56 N. W. 54.”

The case of *Brown v. People’s Bank*, 52 L. R. A. (N. S.) 608, contains a very instructive note on the necessity of proving damage in cases of this kind. It was there said, quoting from page 661, that

“Notwithstanding the default or breach of duty of a collecting bank in dealing with a draft with bill of lading attached, it may, when sued for damages, show in defense, either that no damage resulted, or that the actual damage was less than the face of the paper. Citing *Second National Bank v. Bank of Alma*, 99 Ark. 386, 138 S. W. 472. \* \* \*

If the drawers of an inland bill of exchange are insolvent and have no credit with the drawee, the negligence of a bank employed by the holder to present it for acceptance and

collect it when due does not entail damage. Crawford v. Louisiana State Bank, 1 Mart. N. S. 214. \* \* \*

While it is negligence in a bank employed to collect a draft from drawees at a distance to send it direct to such drawees for payment and returns, nevertheless, if it be established that such draft would not have been paid had other agents been selected to present it, no damage has resulted from such negligence, and the bank escapes liability."

From the foregoing authorities, it is apparent that the admitted negligence of The American National Bank did not contribute proximately or remotely to all the loss sustained by the Bank of Bandon. It is conceded that the negligence of The American National Bank might have been the cause of the loss to the Bank of Bandon of all moneys (\$1600.42) paid out by it subsequent to the 19th day of December, 1913, the date when The American National Bank first received the draft in question, but the authorities do not support the contention of counsel for defendant in error that The American National Bank is liable for moneys advanced (\$4287.36) by the Bank of Bandon prior to said last mentioned date.

It is respectfully submitted that the petition for a rehearing of this case should be granted.

Dated, San Francisco,

April 14, 1917.

EDGAR C. CHAPMAN,

WILLIAM P. HUBBARD,

*Attorneys for Plaintiff in Error  
and Petitioner.*

## CERTIFICATE OF COUNSEL.

We hereby certify that we are of counsel for plaintiff in error and petitioner in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

EDGAR C. CHAPMAN,  
WILLIAM P. HUBBARD,  
*Of Counsel for Plaintiff in Error  
and Petitioner.*



9

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOSEPH E. WARD,

Appellant,

vs.

ROGERS BROTHERS COMPANY, a Corporation,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
Southern District of California, Southern Division.

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Filed

APR 24 1913

F. D. Moulton

Clk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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JOSEPH E. WARD,

Appellant,

VS.

ROGERS BROTHERS COMPANY, a Corporation,  
Appellee.

---

**Transcript of Record.**

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Upon Appeal from the United States District Court for the  
Southern District of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Messrs. W. S. WRIGHT and HARTLEY  
SHAW, Washington Building, Los Angeles,  
California. [1\*]

---

**Citation [on Appeal].**

UNITED STATES OF AMERICA,—ss.

The President of the United States to Rogers  
Brothers, Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal entered and of record in the clerk's office of the United States District Court for the Southern District of California, Southern Division, in suit in Equity No. A-3 therein, and wherein Joseph E. Ward is plaintiff and appellant, and you are defendant and appellee, to show cause, if any there be, why the decree of said court made and entered December 2d, 1915, dismissing plaintiff's Bill of Complaint should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A. TRIP-

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\*Page-number appearing at foot of page of original certified Record.

PET, United States District Judge for the Southern District of California, Southern Division, this 14th day of January, 1916.

OSCAR A. TRIPPET,

United States District Judge.

Received a copy of the foregoing Citation this 20th day of January, 1916.

HARTLEY SHAW,

Solicitor for Defendant-Appellee. [2]

[Endorsed]: U. S. District Court, Southern District of California, Southern Division. Joseph E. Ward vs. Rogers Bros. Co. Citation. Filed Jan. 25, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [3]

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*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

A-3—EQUITY.

JOSEPH E. WARD,

Complainant,

vs.

ROGERS BROS. COMPANY,

Defendant. [4]

**[Bill of Complaint.]**

*United States District Court, Southern District of  
California, Southern Division.*

IN EQUITY.

JOSEPH E. WARD,

Complainant,

vs.

ROGERS BROS. COMPANY,

Defendant.

To the Honorable the Judges of the District Court of  
the United States in and for the Southern Dis-  
trict of California, Southern Division:

Joseph E. Ward, a citizen of the United States of  
America and resident of the city of Long Beach,  
California, brings this, his Bill of Complaint, against  
Rogers Bros. Company, a corporation organized  
and existing under the laws of the State of Cali-  
fornia and having its principal place of business in  
the city of Los Angeles, California, and thereupon  
your orator shows unto your Honors:

1.

That heretofore and prior to the 14th day of  
March, 1910, your orator was the original, first and  
sole inventor and discoverer of a certain new and  
useful Process of Making Roadways, not known or  
used by others before his invention or discovery  
thereof or patented or described in a printed publi-  
cation in the United States of America or any foreign  
country before his invention or discovery thereof, or  
more than two years prior to [5] his application

for letters patent of the United States of America therefor as hereinafter set forth or in public use or on sale in the United States of America for more than two years prior to his said application for letters patent therefor and not abandoned.

## 2.

That on March 14, 1910, your orator made application in writing in due form of law to the Commissioner of Patents of the United States of America in accordance with the then existing laws of the United States of America in such case made and provided and complied in all respects with the conditions and requirements of said law; that on May 2, 1911, letters patent of the United States #991,043 were duly and regularly granted and issued and delivered by the Government of the United States of America to the orator whereby there was granted and secured to your orator and your orator's heirs, legal representatives and assigns for the full term of seventeen (17) years from and after said May 2, 1911, the sole and exclusive right, liberty and privilege of making, using, practicing and vending to others to be used the said invention throughout the United States of America and territories thereof; that said letters patent were issued in due form of law under the law of the United States Patent Office and duly signed by the Commissioner of Patents, all as will more fully and at large appear from said original letters patent or a duly certified copy thereof ready in full to be produced as may be required, and that your orator is now the owner and holder thereof.



## 3.

Your orator further shows to your Honors that the said [6] invention so set forth, described and claimed in and by said letters patent is of great renown and has been extensively practiced by your orator and by licencees of your orator since the grant, issuance and delivery of said letters patent, and that the trade and public have generally respected and acquiesced in the validity and scope of said letters patent and of the exclusive rights of your orator therein and thereunder, and that defendant has had full knowledge of the said letters patent and of the rights of your orator thereunder.

## 4.

Your orator further shows unto your Honors that notwithstanding the premises but well knowing the same and without the license or consent of your orator and in violation of said letters patent and of the rights of your orator thereunder, the said defendant within the year last past and in the Southern District of California, Southern Division thereof, to wit, in the county of Los Angeles, State of California, has used and caused to be used the said process of making roadways and is now using and causing the same to be used and has infringed upon the exclusive rights secured to your orator by virtue of said letters patent, and that the process of making roadways now utilized by defendant is an infringement upon said letters patent and is the invention described and claimed in said letters patent, and that said defendant threatens and intends to continue to use the said patented invention and process and will

continue so to do unless restrained by this court, and is realizing as your orator is informed and believes large profits, gains and advantages therefrom, the exact amount of which is unknown to the orator and your orator prays discovery thereof: That by reason of the premises and unlawful acts of the defendant aforesaid [7] your orator has suffered and is suffering great and irreparable injury, and that from the wrongs and injuries herein complained of your orator has no plain, speedy or adequate remedy at law, and is without remedy save in a court of equity where matters of this kind are properly cognizable and relievable.

To the end, therefore, that the said defendant, Rogers Bros. Company, may if it can show why your orator should not have the relief herein prayed and may according to the best and utmost of its knowledge, recollection, information and belief, but not under oath, (and answer under oath being hereby expressly waived), full, true, direct and perfect answer make to all and singular the matters and things hereinbefore charged, and your orator prays that the defendant, Rogers Bros. Company, its officers, agents, employees, associates, attorneys and confederates, may be enjoined and restrained both provisionally and perpetually from further infringement upon said letters patent and be decreed to account to and pay over unto your orator the gains and profits realized by defendant from and by reason of infringement aforesaid and may be decreed to account to and pay unto your orator the damages suffered by your orator by reason of said infringement,

together with the costs of this suit and for such other further or different relief as equity and good conscience shall require.

May it please your Honors to grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this court and directed to the said defendant, Rogers Bros. Company, commanding it to answer to this Bill of Complaint and to stand to and abide by and perform such orders and decrees as [8] to your Honors may seem meet in the premises.

And your orator will ever pray.

JOSEPH E. WARD.

FREDERICK S. LYON,

Solicitor and of Counsel for Complainant.

State of California,

County of Los Angeles,—ss.

Joseph E. Ward, being duly sworn, on oath, says that he is the complainant named in the foregoing Bill of Complaint; that he has read said Bill of Complaint and knows contents thereof, and that the same is true of his own knowledge, except as to such matters and things as are therein stated and charged on information and belief, and as to such matters he believes said Bill of Complaint to be true.

JOSEPH E. WARD.

Subscribed and sworn to before me this 7th day of February, 1913.

[Seal]

LORRAINE E. DURROW,

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: No. A-3—Equity. United States District Court, Southern District of California, Southern Division. Joseph E. Ward, Complainant, vs. Rogers Bros. Company, Defendant. Bill of Complaint. In Equity. Filed Feb. 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [9]

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*In the District Court of the United States for the  
Southern District of California, Southern Division.*

JOSEPH E. WARD,

Complainant,

vs.

ROGERS BROS. COMPANY,

Defendant.

**Answer.**

Now comes Rogers Bros. Company, defendant in the above-entitled suit, and answers the bill herein as follows:

I.

The defendant is without knowledge as to the subject matter of the allegations contained in paragraph I of said bill and upon that ground denies that the plaintiff was the original, first or sole inventor or discoverer of the process of making roadways therein mentioned, and on the same ground denies that said process was not known or used by others before the invention or discovery thereof by the plaintiff or was not patented or described in a printed publication in



the United States of America or any foreign country before plaintiff's invention or discovery thereof or more than two years prior to his application for letters patent therefor, and for the same reason denies that said process was not in public use or on sale in the United States of America for more than two years prior to the plaintiff's said application for letters patent.

## II.

Defendant admits the allegation in paragraph II of said bill except as to the statements therein that the plaintiff is now the owner and holder of the said patent therein referred to, [10] to, as to which statement defendant is without knowledge and therefore denies the same.

## III.

The defendant denies that the invention set forth and described in said bill and in the letters patent therein referred to, is of great renown or has been extensively practiced by the plaintiff or by licensees of said plaintiff, since the grant, issuance and delivery of said letters patent and denies that the trade or the public have generally respected and acquiesced in the validity and scope of said letters patent or of the exclusive rights of the plaintiff therein or thereunder.

## IV.

The defendant denies that it has within the year last past or at any other time in the county of Los Angeles, State of California, or at any other place, used or caused to be used the process of making road ways referred to in said bill and described in said

patent therein mentioned, and denies that it is now using or causing to be used the said process of making roadways; and denies that it is infringing upon any exclusive or other rights secured to the said plaintiff by virtue of said letters patent. The defendant denies that any process of making roadways now or at any other time utilized by the defendant is an infringement upon said letters patent, or is the invention described or claimed in said letters patent, and the defendant further denies that it threatens or intends to continue the use of said patented invention or process or will continue so to do unless restrained by this court. Defendant further denies that [11] it is realizing any profits, gains or advantages from the use of the said patent or from the infringement thereof, and denies that by reason of any acts of this defendant plaintiff has suffered any injury.

#### V.

Defendant further alleges upon its information and belief that the plaintiff was not the original discoverer or inventor of a process of making roadways described in the invention referred to in said bill, and alleges that prior to the invention or discovery thereof by the plaintiff the same had been invented and discovered by one Tomer and had been used by him in the neighborhood of the city of Visalia, in the County of Tulare, State of California, and also in the neighborhood of the city of San Jose, in the county of Santa Clara, State of California, and defendant further alleges on its information and belief that the said process of making roadways had, prior

to the invention or discovery thereof by the plaintiff and more than two years prior to the application of the plaintiff for a patent therefor, been known and used by divers and sundry other persons in various parts of the United States, whose names and places of use are to the said defendant unknown, and further alleges on its information and belief that said process had been mentioned and described in divers and sundry publications prior to the invention or discovery thereof by the plaintiff and more than two years prior to his application for a patent therefor, the names and dates of said publication being at the present time to the defendant unknown; and defendant prays that upon ascertainment of the matters so unknown to it it may have leave to amend its answers in that respect. [12]

WHEREFORE, our defendant prays that the plaintiff take nothing by this suit and the defendant be hence dismissed with its costs.

W. S. WRIGHT,

HARTLEY SHAW,

Solicitors for Defendant.

[Endorsed]: Original. No. A-3. In the District Court of the United States, Southern District of California, Southern Division. Joseph E. Ward, Plaintiff, vs. Rogers Bros. Company, Defendant. Answer. Received copy of the within — this 4 day of April, 1913. Frederick S. Lyon, G. T. H., Attorney for ————. Shaw & Stewart, 529-532 Stimson Building, 256 S. Spring St., Los Angeles, Cal., Attorneys for Defendant. Filed Apr. 4, 1913.

Wm. M. Van Dyke, Clerk. Chas. N. Williams,  
Deputy Clerk. [13]

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*In the District Court of the United States, in and for  
the Southern District of California, Southern  
Division.*

IN EQUITY—A-3.

JOSEPH E. WARD,

Plaintiff,

vs.

ROGERS BROTHERS CO.,

Defendant.

**Decree.**

This cause came on to be heard at this term and was argued by counsel for the respective parties, and thereupon on consideration thereof it was ordered, adjudged and decreed that the plaintiff take nothing by this action; that the plaintiff's bill herein be and the same is hereby dismissed, and that the defendant recover its costs herein, taxed at \$——.

Done in open court this 2d day of December, 1915.

TRIPPET,

Judge.

Decree entered and recorded December 2, 1915.

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk.

OK. as to form.—TKL. [14]



[Endorsed]: Original. In Equity—A-3. In the District Court of the United States in and for the Southern District of California, Southern Division. Joseph E. Ward, Plaintiff, vs. Rogers Brothers Co., Defendant. Decree. Filed Dec. 2, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Received copy of the within decree this 1st day of December, 1915. Frederick S. Lyon, Attorneys for Plaintiff. Hartley Shaw, 1023 Washington Building, Los Angeles, California, Attorney for Defendant. [15]

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*United States District Court, Southern District of  
California, Southern Division.*

IN EQUITY—No. A-3.

JOSEPH E. WARD,

Plaintiff,

vs.

ROGERS BROTHERS COMPANY,

Defendant.

**Statement of Evidence Under Equity Rule 75.**

**[Testimony of Joseph E. Ward, in His Own Behalf.]**

JOSEPH E. WARD, testifying on his own behalf, testified that he was the plaintiff to whom letters patent Number 991,043 were issued; that he was familiar therewith and was engaged in road construction and had demonstrated the process of said letters patent from New York to British Columbia to the extent that he had built stretches of road; his work had

(Testimony of Joseph E. Ward.)

largely been in Los Angeles County in California; that he had built roads in New York, North Carolina, Texas and British Columbia under this process; that he has issued eighty-nine licenses for the use of this process, the city of Los Angeles and the county of Los Angeles being licensees, and the State of California being a licensee for the use of the process with one or two of the machines and some of the other counties of the State of California have licenses for the use of the said patented process with certain machines; that the licensees simply purchase the machines from him and in connection with the purchase of the machine a license to use the process without further compensation in connection with the use of such machine is granted by him; that on January 2, 1913, he saw defendant constructing a piece [16] of road called Clearwater Road on the Salt Lake and Southern Pacific tracks over toward Clearwater in Los Angeles county. On February 17, 1913, he saw defendant constructing a piece of road at the lower end of the Harbor Boulevard in Wilmington, Los Angeles county, California. On January 21st, 1913, he saw defendant working on a piece of road for the county of Los Angeles on the San Fernando road in Los Angeles county; that he took two photographs showing the apparatus as used by defendant, one of the Harbor Boulevard use and the other as used by defendant on the Clearwater road (Complainant's Exhibits 2 and 3, respectively). Comparing the process of Patent Number 991,043 (Complainant's Exhibit 1), with the process used by defendant on the

(Testimony of Joseph E. Ward.)

Clearwater and Harbor Boulevard roads, Mr. Ward says:

“A. Well, the patent covers the process of applying the oil under pressure, exposing it to the air and mixing it in the air, and with the air causing the oil to oxidize by the fact that it has been broken up under pressure much more readily than it would if it was applied the old way in streams by gravity. The machine that the Rogers Brothers have does identically the same thing. They use the same pump to give this pressure. With their trucks they drive the pump off of a shaft. The results obtained are identically the same.”

Defendant uses a nozzle and the oil comes out in a fan shape; the pressure forces it out in a fan shape spray directly downward; this spray is very thin; it is broken up and you can see through it in many places; it immediately covers every particle of the road surface and the pressure behind it shoots it into the voids and interstices of the road surfaces so that every particle is immediately covered. As the apparatus moves [17] forward the air comes right up against this sheet and the force of these sprays are fan-shaped streams coming down causes, as I understand it in my way of telling it, a vacuum which immediately mixes with the oil; the fan-shaped sprays or sheets of oil draw the air down and intermingle the oil and air causing the oil to oxidize much quicker and harden much quicker; defendant company did not have any license or authority from plaintiff for the use of such process on either said San Fernando,

(Testimony of Joseph E. Ward.)

Clearwater, or Harbor Boulevard roads.

Prior to the introduction of this process the specifications for road building throughout California required as high as two gallons and a quarter of oil to the square yard; since the introduction of my process the specifications generally throughout California require a gallon or less to the square yard. The difference in this process amounts to a saving of at least one-half the cost of oil.

On cross-examination Mr. Ward says: The appearance of oil as discharged from the machines built by plaintiff is a very thin film; a fan-shaped spray discharged directly down onto the ground. The nozzles used in the apparatus are such as to cause a thin fan-shaped spray or jet; the nozzles used have a sort of lip projection against which the oil strikes to break it up; this is for the purpose of breaking up the oil as it is discharged. The nozzles are arranged from six inches to two feet above the ground. At the time he applied for the patent the nozzles were placed approximately ten or twelve inches from the ground. I have collected approximately \$1,500 royalties for Oregon, British Columbia and Washington. Defendant commenced infringing approximately January, 1913. The only royalty I collected in California was \$800 from J. R. Ott [18] Company. Have collected no licenses in the rest of the United States. The only license taken by Los Angeles county was in July, 1912, to Los Angeles County Highway Commission at which time I sold them the equipment for building two machines. Los Angeles



(Testimony of Joseph E. Ward.)

county is now using other machines not purchased from me or licensed by me; *you could not the effect of my process without pressure*; pressure is certainly covered in the patent; people might use pressure and shoot the oil down and around the stream and not break it up at all; breaking the oil up under pressure is one of the essential features of the process; atomizing means breaking the oil up under pressure; you can break it up fine or coarse or you can break it up coarser; it is absolutely impossible to break a very heavy oil up into as fine particles as you can water or lighter oils and the temperature of the oil has everything to do with it; the heavy oils are usually applied to the road for about 400° Fr. By heavy oil I mean ninety to ninety-five per cent asphalt. The oil now generally used for road making is from ninety to ninety-five per cent asphalt. It is possible to break these oils up in fairly fine films or particles where discharged under pressure at a temperature of 400°; you could not make a mist out of them; if the oil was light it could be atomized simply by pressure in striking the *atomized* obstruction and without heating but a heavy oil has to be heated as well as forced out under pressure and heating alone would not atomize it. The amount of pressure depends on the quantity and the temperature of the oil and the force necessary to force it out including the density of the oil. With my machines I use from eight to fifty pounds per square inch; with heavy oils, ninety to ninety-five per cent asphalt, at 400° temperature, I use from twelve to eighteen pounds pressure. De-

(Testimony of Joseph E. Ward.)

fendants' Exhibit "A" is substantially one of the nozzles used by me. I have examined the nozzles used [19] by defendant and seen them in operation. Defendant's Exhibit "B" is like defendant's nozzles. When I observed defendant's nozzles in operation the oil was coming out of the openings in a thin film, or atomized; a thin sheet or thin film discharged about six or eight inches above the ground; defendant's machine is so arranged that you can raise or lower the point of discharge; the oil came out in a thin, fan-shaped sheet or film broken by pressure; it broke very close to the ground; possibly some of the sheets would break two or three inches from the ground and some of them would be closer to the ground; it separated into atoms and broke into small or big or large; oil as discharged from this machine did not separate into strings or streams of oil. By atom I mean a large or small particle of oil; oil may be atomized thin or it may atomized coarse; in looking at the oil as discharged from defendant's machine I couldn't distinguish any individual atoms, but you could see that it was broken up; with the defendant's machines, as the machine was moving forward and the fan-shape jets were being projected out and downward, the volume of air would naturally come in and form a vacuum where the oil came in contact with the road; as I understand the vacuum it would be binding of any object to another by the air,—by the air chamber; the vacuum tends to increase the oxidation of the oil; I am not a chemist and only know the results obtained by my process; I

(Testimony of Joseph E. Ward.)

know we built the best roads ever built in the United States and know that by the use of my process the oil is caused to harden much faster even with the same quantity of oil; prior to inventing my process I knew of oilers that worked by force of gravity; when I saw defendant's machine in operation the oil as it was discharged was mixed with air; the oil passing through the air all the way down would [20] be suspended in the air and there would be air all around it from the time it left the nozzle until it got to the end of its downward journey; the oil would certainly be suspended in the air; your hand would be suspended in the air, as an illustration; as I understand it, there would be air all around it, that is my definition of being suspended in the air; if you take a brick and hold it in your hand and drop it, the brick is suspended in the air,—there would be air all around it; if you pile up a pile of brick there would be air all around the bricks; they would be suspended in the air; at the time I applied for the patent in suit they were using a much lighter gravity oil than is now used; in the lighter oil the volatile matter in it would come off quicker and it would mix with the road quicker than the heavier oil because the heavier oil would not penetrate and there is less volatile matter to come off; at the time that I saw defendant's machine at work they were building a street or part of a county highway; they were putting a bituminous surface on a rock macadam road; I don't remember whether there was any dust on the surface where they were spreading the oil; rock had been deposited and rolled down with a roller.



**[Testimony of Gilbert E. Bailey, for Plaintiff.]**

GILBERT E. BAILEY, called for plaintiff, testifies: He is sixty-three years of age; in charge of the department of geology of the University of Southern California, and has been for five or six years; prior to that time had charge of the Department of Chemistry in the State University of Nebraska; Department of Metallurgy of the School of Mines of South Dakota, and has been engaged in geological work and in commercial chemistry for a good many years with his own laboratories, manufacturing and inventing; studied chemistry in the University of Chicago and the University of Michigan, giving particular attention to the subject of organic [21] and inorganic chemistry for forty-five years; has studied asphaltic oils; testified as one of the experts in the dustless roadbed case in this court involving the so-called Mattern oil road patent in 1905; has examined and is familiar with patent 991,043 in suit; has observed the operation of such process in making roadways; referring to the patent in suit, and particularly with the term "suspended in the air," as used in said patent, he says:

"A. I think the word as shown by the operation of the machine means this: The oil issuing from the nozzle passing vertically downward passes through ten to twelve inches of air. In that passage, in one sense, it is suspended in the air the same as any body moving in the air—a cannonball or a bullet. The oil passing from the nozzles down interferes with the air in passing through it so that there is a tendency



(Testimony of Gilbert E. Bailey.)

to cut the particles of the oil with air. Now, when the oil strikes the ground with the force given by the pump, it penetrates to a certain degree the dust or dirt of the surface and mixes with that dust, and the air that it carries down in that passage is held in those spaces, and to that extent is mixed or suspended with the air. In other words, the air when brought in contact with the particles of oil so that the oil absorbs it and operates to oxidize, the effect being that the film that is put on the road is thickened and hardened. In regard to the oxidation, I notice in going behind those machines and as shown in the photographs that you can see through the film. As it comes down it is transparent. Therefore it must be exceedingly thin at those transparent points, and the particles in it must be of very narrow diameter. That film in coming down under pressure, the very fact that they branch out in a fan shape, shows that they rebound—that is, there is a separation which would facilitate the mixing of the air with [22] the oil, and as the oil comes down vertically with force it is also moving forward, so that the downward rush would tend to create a vacuum down, in drawing air against this thin film; and as it moves forward the air comes in contact with it. The thinness of the film seemed to me in watching the machine, and its fan shape, and the force it came down with, seemed to be its peculiarities as distinguished from sprinkling or flowing from a spout and so on.”

The breaking up of the oil into thin particles or sheets and the envelopment thereof in the air brings

(Testimony of Gilbert E. Bailey.)

a greater quantity of air in a lesser time in contact with the oil, increasing oxidation; as another illustration of an envelope of substance about crude oil is the common one of water and oil that we have so frequently at the oil wells. Water comes with the oil and the particles of oil fill with water and it is difficult to separate the two; such body of oil and water is similar *nd* the body of oil and air as thus projected downward into the air by the process of this patent; the oil striking the ground with force and forced into the roadway surface has a tendency to carry the air down and hold it there and when it is so held it is really quite difficult to separate it in any form; on February 17, 1913, I accompanied Mr. Ward to the Harbor Boulevard near Wilmington and inspected the defendant's machine in operation and compared the process as being there used by defendant with the disclosure of the patent in suit. I should judge and say that they were the same and the effect was the same; the photographs show that they gave the same fan shape and were forced down under pressure and produced the same effect on the road.

On cross-examination Mr. Bailey testified: Atomization in the patent means a small subdivision of the material, asphaltum or oil without destroying the identity of [23] the material; it is still asphaltum and still oil no matter how small the atom may be; atomization in this sense means the causing of oil to be divided up into small particles; oxidation of

(Testimony of Gilbert E. Bailey.)

oil is seen in the thickening and hardening of the oil; anything that absorbs and chemically unites with the free oxygen of the air is said to be oxidized; a combination of any material with the oxygen in the air is oxidation; a chemical combination; all oxidation is the same whether a stick of wood burns in a stove or decays in the forest, the chemical result is the same; the only difference is in the time occupied; the oxidation of oil on the road would not be as complete as the burning of it in fire because in the road the oxygen is still combined with the asphalt, the carbon or the hydrogen of the asphalt, whereas in burning it in the stove it is broken up still further and goes into gases, etc.; so far as the beginning is concerned it is the same chemical process, it unites with the oxygen; I have seen Mr. Ward's machine in operation probably half a dozen times and particularly to see the operation of the nozzles,—how the oil looked; the oil issued from the nozzles in that fan shape form and formed a very thin film that was transparent, and the pressure was evidently considerable because you could hear a hissing sound or noise showing the force exerted, and it struck the surface of the ground with force, but what I was interested in in watching it was to see the difference in the form of those fans as it was like drawing a varnish brush along on the ground and forming a thin film on the ground rather than spraying it or putting it on with a large hose we did in the early days; I was interested too in the fact that the film was transparent. The film as it



(Testimony of Gilbert E. Bailey.)

came between the nozzle and the ground; that film itself was so thin that it was transparent; you could see through it; in parts you could detect some of the broken up portions, but the [24] general effect to the eye was that of a film. The oil undoubtedly was broken up and "atomized" was the word that you could use to describe it; it was well exposed to the action of the air, and the force coming down tended to draw the air to it, and the thin sheet gave the air a chance to get at the particles; I saw defendant's machine along February 17, 1913, on the Harbor Boulevard; the oil came out of the nozzles in a thin triangular sheet or film; by looking at it you get the same idea on the eyes as you do from the photograph; so far as the currents went, a person might have considered the oil came out in an unbroken sheet or film, but if you examine the nozzle it would not be so, because if you examine inside of one of those sparkling nozzles you get an interruption there that tends to break up or pulverize or disturb the continuity of the oil; in other words, the effect would not be the same as if flowing through a tube and dropping out of that tube by gravity because there is force behind it, and a piece that it runs over there breaks it and gives it the spray; that is the very object of the slot nozzle and the piece turned in there is to break it against the sharp edge; other than that it would show in the solid form; I could not see how much was smoke and how much was dust and fine particles in any cloud or mist arising after the oil hit the ground.



**[Testimony of Alfred E. Burns, for Defendant.]**

ALFRED E. BURNS, called on behalf of defendant, testified; that he was fifty years of age and had been engaged in business as contractor in the oiling of roads for fifteen years in Los Angeles County, California; Los Angeles County was just experimenting with oil roads when he came there; in 1901 the device most common in use then was a trough independent of a tank which was attached to and dragged loosely behind a tank conveying the oil; the oil ran into that trough or box from an outlet in the rear of the tank and was distributed through a series of petcocks [25] along the edge of the box; after that an ordinary Studebaker sprinkler was used; that was the same device that they use on water-wagons; it discharged it by the pressure of the gravity of the oil with the weight behind it, the pressure decreasing as the weight of oil in the tank decreased; the discharge was through the slot; the oil sprayed out in prism shape flow onto the road; it was a straight sheet; it dropped down vertically; these sprinklers were carried about two feet above the road; sometimes they used two small outlets each about a foot above the road; these machines were commonly used in 1901; the roads were graded up to the grade required, and the surface made smooth and without rolling the oil was applied; then the surface was harrowed until the oil was mixed within possibly one inch of the surface; a plank was then drawn over the surface, and the surface was then rolled; I knew a man named Hatfield; in the fall of

(Testimony of Alfred E. Burns.)

1901 or the spring of 1902; on a tract that was called the Angelus Vista Tract in Los Angeles; he oiled one street and some portions of another; he was improving his machinery at that time and did not complete the contract; there was a number of persons present; then street superintendent, Maguire; George Wilton of the firm of Fairchild, Gilmore & Wilton, and myself, and Charlie Stansbury, a grading contractor, and some of our men; Mr. Hatfield forced the oil through a perforated tube under steam pressure; oil came out in an oily mist; the outlets were about three inches above the ground; if the surface was rough he would raise it higher; the oil was scattered into the mist and it scattered out in a little cloud all along behind the tube.

On cross-examination Mr. Burns says: I never saw this Hatfield machine except the once; the Hatfield experimental devise threw the oil probably twelve or fourteen inches behind the machine; he had the engine from the [26] boiler of which he used the steam; his distributing tube was a double tube both perforated; into the outer tube, by gravity, he ran oil in the inner tube, by pressure, he forced the hot steam. Through perforations in the inner tube steam was forced into the outer tube full of oil, from which it again was projected in clouds through perforations onto the surface of the street; I don't know whether he had a half dozen rows of these outlets in the outer tubes; of course he was experimenting and he took first one row and then two; he had out-

(Testimony of Alfred E. Burns.)

lets in the two, but whether there was one, two or three—I guess he had different tubes with different holes in each; my firm never used any of this apparatus after that.

**[Testimony of Ellis Tomer, for Defendant.]**

ELLIS TOMER, called on behalf of defendant, testified: resides in Stockton; is engaged in the business of oiling roads and making road-oilers; first began seven years ago on March 17, 1908, at Visalia, California, oiling the dust roads there, the dusty streets to settle the dust; he was spraying trees and the city council wanted to know if he could settle with oil, and ask him to come in and try out, and so he did; he had a gas engine and pump and Bordeaux spray nozzles like Defendant's Exhibit "A"; the oil settled the dust; the oil came from the machine in a fine spray or mist; he oiled in 1908 perhaps twenty miles in all; second season he had a different patent machine; with the first machine he oiled the streets twice; the first time he went over the streets with a light coat to settle the dust, and it did not take that long to evaporate, so he went over the roads again with another coat to keep the dust down, and went over those streets twice in one year; was using light gravity fuel oil; might carry about twenty-five per cent asphalt; second machine took to Stockton; it used Bordeaux spray nozzles; the oil came out vaporized, [27] fan shaped; the first machine was a tank wagon with pump, boiler and manifold all on the same wagon; the next thing was a two unit machine which trailed on behind, but all machines



(Testimony of Ellis Tomer.)

used the same nozzles discharging the oil in a fan-shape; the oil was broken up fine enough so I could make a film on a rock street with it without leaving any streaks; the Visalia streets were dirt roads with dust on them but no rock; he oiled streets in Hanford, Selma and Santa Cruz during 1908; dirt streets in Visalia and Selma and waterbound macadam in Santa Cruz; by waterbound macadam, I mean rock rolled down; all his machines discharged the oil in fan shape; in a fan spray; under pressure from the machine; the nozzles were arranged about eighteen inches above the ground; when there was wind the wind would blow the spray quite a ways.

On cross-examination Mr. Tomer says: That the purpose of the steam boiler on the second machine was to blow the manifolds out so that the manifolds and oil lines would not become clogged; he didn't use the steam when oiling the roads; the steam was used to run the pump and to blow out the manifolds and oil lines.

**[Testimony of George A. Rogers, for Defendant.]**

GEORGE A. ROGERS, called on behalf of defendant, testified that he resided in Los Angeles; is the treasurer and general manager of defendant; engaged in the road-making and machinery business and the sale of road-making machinery since 1908; interested in machinery for oiling roads since 1908; 1910 defendant took its first contract in California for an oil surface for roads; in 1908 the only road oiling machines that he saw were the gravity ma-



(Testimony of George A. Rogers.)

chines known as the Baldwin and the White that applied oil to the road by gravity; the system was by gravity from the tank down through a pipe and at first they had holes in a pipe to let the oil through to the road, and then afterwards they [28] tried a slot or long slit in the pipe with a slide arrangement for shutting it off and controlling the flow from the pipe to the road; defendant in 1910 had a contract for oiling the valley road near Rivera, Los Angeles county, and used plaintiff's machine thereon; the nozzles were arranged twelve or fifteen inches off the ground; the machine had a gas engine and pump and the nozzles were small and broke the oil up and sent it out in a spray of cloud or mist not in a solid sheet; so much so that the wind affected it and blew it around; defendant company is using a Monarch road oiler manufactured by Good Roads Machinery Company of Pennsylvania; defendant used the same machine on the San Fernando road, the Harbor Boulevard and near Clearwater in the early part of 1913. Defendant's Exhibit "C" is a picture of defendant's machine applying oil on the streets of Imperial on a concrete pavement; he has seen the Ward machine and the Tomer machine in operation; defendant's machine discharges oil in a solid sheet; the nozzles are along close to the ground about six or eight inches above it; the oil is discharged in a fan-shape sheet practically solid; the sheet continues solid until it strikes the road surface; our effort is to get a uniform application of oil of a certain quantity per square yard.

(Testimony of George A. Rogers.)

“Q. Do you know what the general practice is among engineers in job specifications as to whether they call, in them, for oil to be atomized or not?

A. I do, in this regard, that the first pressure machine used on macadam was used on our road in 1910, the road being built by George A. Rogers, afterwards Rogers Brothers Company, and then I know that the engineers changed the specifications because *because* we could get a much more even distribution of the oil and get the quantity per square yard, and they wanted it pumped out onto the road with pressure. With the gravity machine [29] we had some pressure when we started; but as it got low in the tank the pressure would be very light, and therefore the application would not be uniform.

Q. (By Mr. SHAW.) Do you know whether there is any custom or practice among road and highway engineers as to whether they require oils supplied to their roads to be atomized?

A. I never heard of any engineer taking bids upon atomizing oil or applying it on the road by atomization. I never saw it in any printed specification on which I ever bid; never saw the word “atomized” used in connection with the application of oil to macadam or concrete or anything on which I have bidden in California.”

Defendants use about twenty-five to thirty pounds pressure with their machine; the nozzles are arranged six or eight inches above the ground to get an unbroken sheet of oil to hit the road so that the ap-

(Testimony of George A. Rogers.)

plication will be uniform; with the Ward first machine with the nozzles fifteen to eighteen inches off the ground the wind affected it and defendant didn't get a uniform application of oil as the nozzles were fifteen to eighteen inches above the ground.

On cross-examination Mr. Rogers says: The first pressure machine he ever used was in 1910 on the Valley Road in Los Angeles county, and that was the Ward machine; Mr. Ward himself drove that once or twice; that was the first time the witness knew of a pressure machine being used in Los Angeles county and that was the cause of the adoption of that class of work in Los Angeles county; that together with the fact that about half a dozen machines came out in the east and were being extensively advertised and put on the market; every one changed to pressure machines; defendant continued to use the Ward machine from 1910 to 1912, when somebody stole it. [30]

**[Testimony of Frank H. Joyner, for Defendant.]**

FRANK H. JOYNER, called on behalf of defendant, testified: that he was fifty-three years of age; a road engineer and a road commissioner for Los Angeles county since *since* April 6, 1914; from February 11, 1911, to April 6, 1914, he was chief engineer for the Los Angeles County Highway Commission and engineer in charge of the maintenance and repairs of the main highways of Los Angeles county; from 1898 to 1911 he was division engineer with the Massachusetts Highway Commission; he had experience in the construction of roads and supervising the



Testimony of Frank H. Joyner.)

construction of them during all of that time; he first knew of oil being used on state highways in 1905; on said roads on Cape Cod, Massachusetts; does not know how it was applied; his first personal knowledge of the application of oil on roads was in 1908 in Massachusetts; saw gravity oilers in 1906 or 1907; that is a common sprinkling water-wagon, and they used the ordinary water spray; the oil came out of this spray; thinks it was three or four inch pipe stuck into a pan and then spread out and fell over onto the road in the form of a thin sheet or film of oil; oil would remain solid until maybe a foot and a half after leaving the pan, and gradually it would separate into streams as it struck the road; that was a thin, light oil; they tried a great many different ways of applying the oil; one of their oilers had a header-pipe in which was fastened a number of smaller pipes a quarter of an inch in diameter; oil from these smaller pipes discharged into a board ten or twelve inches wide that came close to the ground; as the oil ran down that board each individual stream would fan out and it would join in a solid sheet as it left the board and went onto the road; they used that to oil a couple of miles in 1907 or 1908; in Los Angeles county they now use pressure machines, applying the oil under pressure; pressure is developed in one case by compressed air and in another case by a pump; those Los Angeles county have, *have* a slot and a [31] nozzle like Defendant's Exhibit "B"; has seen the defendant's



Testimony of Frank H. Joyner.)

machine in operation on macadam road; their nozzles are six or eight inches from the ground; not positive as to this; oil discharged from this machine in a fan-shape stream; struck the road in a solid sheet or practically a solid sheet; by fan shape means inverted V-shaped; comes out and gets thinner as it approaches the earth; when working satisfactorily strikes the road in a solid sheet; there is always some cloud or mist of oil or smoke or steam that arises in back of those machines when they are running; it is a fog or it might be finely, well, I don't know, it might be finely divided oil; it comes from the oil; when the hot oil comes out in the air and strikes down on the cold stone, a sort of steam or fog will come up; with those machines it does not divide into fine particles until it strikes the road; frequently the road is watered and there you will see the steam; when he observed the defendant's machine the oil between its leaving the machine and its hitting the ground did not have any finely divided particles or cloud or mist around it, and did not appear to be atomizing the oil or to maintain any of oil suspended in the air that he could see; county machines which they are now using are not constructed of any material bought from the plaintiff; states that two or three years ago he had a conversation with plaintiff; plaintiff wanted to give the county of Los Angeles a license to use the machines and *he* refused to accept it; states he has no recollection of having written to Mr. Ward on account of the Los Angeles Highway Commission and asking

Testimony of Frank H. Joyner.)

Mr. Ward for a license to use this road oiling apparatus, or more particularly his method or process; is shown Plaintiff's Exhibit 4 signed by him, admits that he signed it and mailed it to plaintiff under date of March 21, 1912, and stated in that: "I write to ask your permission to make use of your method on these two machines"; [32] states that these two machines referred to were two oil patching machines that one of his foremen was inventing or trying to invent; asserts that the letter was a mere matter of courtesy to Mr. Ward.

**[Testimony of William Higley, for Defendant.]**

WILLIAM HIGLEY, called on behalf of defendant, testified that he lives in Los Angeles; is fifty-three years of age; oil inspector of the city of Los Angeles, and has been for five years past; his duties are to see that the oil is put on the streets properly; he simply inspects the oil, taking the temperature and seeing that the oil is all right; he is out watching the while the oil is put upon the street; he has seen both pressure and gravity machines; he has seen the plaintiff's device and process and has seen the machines the defendant uses; the Monarch machine; states that with the plaintiff's machines the oil comes out in rather a vapor; the pressure is so strong in back of it it forces it out and the air is all filled up with the oil around the sprinkler; that with the Ward machine the nozzles are usually eight to twelve inches above the ground; some are lower than others; the city of Los Angeles

(Testimony of William Higley.)

is using one of Mr. Ward's machines at the present time; the city does not own these; the contractors own them; the city had one trailer and discarded it; it did not give satisfaction; they could not get the oil on the street properly; people were making complaint about sprinkling their clotheslines, and so forth; the air was all full of oil, and we ruined clothes; it was because the pressure was so strong it brought it out in a vapor; the defendant's, or Monarch, machine puts oil on with a pressure the same as the Ward sprinkler; they carry the nozzles behind just about the same as the plaintiff's machine; from eight to twelve inches above the ground; with these machines the oil comes out in a steady sheet from the [33] nozzle; when it hits the ground *its* a solid sheet of oil, fan-shape like; states he has never seen any sign of oil being atomized around this machine while it was working or any cloud or mist of oil about it; states that Defendant's Exhibit "C" looks like the Ward, or plaintiff's machine; asked if he was sure what it represents, and to take another look at this photograph; says he don't know, can't make it out very well; would not say whether it was a Ward machine or what it is.

On cross-examination he testified: That he does not know anything about the machine which was condemned by the city because it didn't give satisfaction except that it was called a Ward machine; don't know whether Ward furnished any of it.



**[Testimony of E. A. Doran, for Defendant.]**

E. A. DORAN, called on behalf of defendant, testified: that he was a resident of Los Angeles, forty-four years of age, and an oil operator; had considerable experience in road oiling as a contractor; knew Clarence W. Hatfield, somewhere in the neighborhood of 1902, or 1903, prior to 1904; he had a machine for oiling roads; witness saw it in operation on his work; had a contract at what was called the Angelus Vista tract, south of Sixteenth, about half a mile west of Western in the city of Los Angeles. A. E. Burns was connected with witness company at that time. Hatfield didn't do much work with this machine; all he could say about it, it was brought out there through Charles Stansbury, who spoke to him about having Mr. Hatfield try an oiling device that he had; we were using at that time the gravity system entirely; Stansbury said this man named Hatfield had a machine that he was anxious to try and so we said that we would let him try it out; he brought it out there and I should say we [34] used it on one or two loads of oil, something like that; it was quite awhile ago, and I don't have an absolutely clear recollection *on* it, it was on wheels and attached behind the wagon; the oil was pumped through a series of pipes with, as I remember it, stop-cock control and thence through either some nozzels or pipes of some kind or other to distribute it onto the road to the rear of the machine; the oil came out in a spray behind the machine, not in a stream; as to how fine a spray it was, witness says he would say that at the



(Testimony of E. A. Doran.)

time it hit the ground it would splatter a little and I would like to say, to make myself a little clear on it, that it would be like you take a hose with a coarse spray and hit the ground it would splatter a little; I don't know as I can make myself absolutely clear on it, my recollection is so hazy; I don't know how to make myself clear as to the difference in sprays, or the density, or anything like that; the oil came out in the Hatfield machine in a kind of sheet spray and the further it got from the nozzle the wider it sprayed and the thinner it got; I don't know what shape the openings were in the nozzle; my recollection is that it came out under pressure; that he had a pump or little auxilliary engine; I have had absolutely no reason to refresh my mind on this thing and we dismissed it at the time because we couldn't spend any time with it; we didn't have any time to spare and consequently I have never had any occasion to impress it on my mind at all or try to remember it in any way; I don't know whether I could say at this time whether the road was left in a satisfactory condition for us to handle or not; the main thing I remember about it is that we didn't use it very long and we could not continue with it; Now, whether this was on account of mechanical difficulties entirely, or whether the condition of the road had anything to do with it, [35] I have just forgotten. At that time we were using the Studebaker head and we had tried what Mr. Mattern, the father of practically all this road business had gotten out, which was something in the form of an old-fashioned farmer's

(Testimony of E. A. Doran.)

drill, only it was low and the oil was run by gravity from the tank into this hopper that was probably six feet long, and this hopper had openings and pipes leading from that which were controlled by a series of stop-cocks with a lever; the openings, as I remember, were pieces of pipe screwed into stop-cocks and projecting downward; instead of leaving the pipe ends round, I believe they were flattened so as to kind of widen out; when the hopper was full the openings would discharge the oil into a kind of solid fan shape; of course there was no great pressure because it was strictly gravity; we used this in different places; it was unwieldly and unhandy and we didn't use it only where we practically had to; we used it for commercial work and had three or four of them; the Studebaker was simply a water sprinkling head; it was never designed as oil equipment at all but it answered our purposes very well; it was attached to a four-inch line or outlet from the bottom of the tank and it shot the oil out in a fan or spray directly down onto the road and a little wider, say a foot or a foot and a half wider than the wheel, the outside of each wheel; the opening through which the oil was discharged was really a crack which could be varied in width by set-screws and it was more than half of the diameter of the opening; the oil came out and hit against this sprinkled and reflected downward, and then you could adjust that plate as to width and you would get your light or heavy coating of oil depending on the gravity and temperature at which you attempted to put the oil on; the crack would vary from nothing [36] to

(Testimony of E. A. Doran.)

a good quarter of an inch, possibly more; we put on a great many hundred of thousands of barrels of oil with this device oiling streets; in the first place, if the street was uneven we plowed it and rolled it and then scarify it with harrows loosening up the surface to the depth of an inch or more and then applying the oil and then harrowing again and then applying gravel or sand; the oil paving business was in its infancy and we were trying all of the specifications we could figure out to get the best results; the oil was about fifteen gravity and carried sixty or sixty-five per cent asphaltum and was put on hot; we used that, I should say, prior to 1900 and still use it, I don't mean exclusively, but there are jobs where it can be worked; we simply use the cheapest and best method we can.

On cross-examination Mr. Doran states. That they finished up the Angelus Vista job after abandoning the trial of the Hatfield machines and used a Studebaker head; don't know what became of the Hatfield device after that; never heard of it; continued actively in road oiling until 1910; his firm of Doran, Brouse & Price was one of the largest, if not the largest, oil road contractors in Southern California during that time, if he remembers the Hatfield device correctly, it shut the oil to the rear rather than downward; witness does not remember whether the delivery of the oil in the Hatfield device was by mixing steam with oil to shoot it out but does remember that Mr. Hatfield had a steam boiler rig.

**[Testimony of Charles R. Brawner, for Defendant.]**

CHARLES R. BRAWNER, called on behalf of defendant, testified: That he resided in Los Angeles; is thirty-five years old and has been a practicing civil engineer for about thirteen years; [37] made his first observations of road oiling in San Francisco in 1904; was employed in the city engineer's office at that time; at that time we used the Studebaker head for road oiling; it is a sort of bell-shaped apparatus that the oil comes straight out and hits the plate and is shot down to the ground in a fan shape sheet; the cylinder part of the opening was probably about five inches in diameter and the slit in the bottom of it extended probably two-thirds around the cylinder; the opening was probably a quarter of an inch wide; the oil came out in a thin sheet and sprayed out fan shape until it hit the ground; if there was no wind, if the air was calm and the opening about right, it would go clear to the ground without a break; if there happened to be a little wind it would break up as it got towards the ground; it was forced out merely by the pressure of gravity; the Studebaker head was in general use for the distribution of oil as early as 1903; the next different machine I saw was the White; that applied the oil in round streams; the oil was led from the tank back to a receiving chamber or cylinder that extended crosswise back of the wagon and was fed from a pipe in the tank; on the bottom was a plate with holes bored in it about every inch and a half; the oil would run into this chamber and through these holes and drop to the ground and in the



(Testimony of Charles R. Brawner.)

bottom of this plate was another that worked back and forth; it had holes in it and when it was pushed over so that they didn't mate it acted as a valve shutting the oil off; since 1906 I have been in Southern California almost continuously connected with street improvements; have had occasion to be on the ground when oiling was being done; am familiar with methods and processes for doing it; had seen the machine of the defendant in operation; in the defendant's machine the flow of oil and the sheet is at right angles to the wagon is going; it is one solid sheet until it hits the ground; that is a photograph [38] of defendant's Rogers Brothers, machine working; when he saw the machine working the nozzles were approximately seven to eight inches above the ground; the oil in the Ward machine comes out in a somewhat similar method; the Ward machine uses a nozzle of smaller bore; the oil coming out has more of a tendency to break; does not break to the extent of atomization; the amount of oil that comes out would depend directly on the pressure; if you *forfee* the same amount through a small nozzle as through a larger nozzle, the tendency to break is greater from the smaller nozzle; the old Studebaker sprinkler is nothing more or less than one of these other nozzles enlarged; the oil came out by gravity; the viscosity of oil is greater than that of water, and consequently it stuck together better and didn't spray so much; in the Monarch machine the oil emits from the nozzle through the opening there and gradually spreads out in width and crosswise of the road, thinning the sheet

(Testimony of Charles R. Brawner.)

as it hits the ground; if you were to take a ground-section of the sheet of oil you could not determine the thickness to it, but there would be thickness to it, probably two or three hundredths of an inch and probably a foot wide; under normal conditions of working it will almost inevitably go in a solid sheet; when the wind blows some particles would blow back a little, it would whip off in needle form, but not in a spray or atomized condition; I have never seen a machine that put on oil that atomized it in all my experience.

On cross-examination Mr. Brawner states: That there is not much difference in road oiling in the ordinary practice; he didn't know the capacity of the pump on defendant's machine;

**[Testimony of H. H. Fillmore, for Defendant.]**

H. H. FILLMORE, called on behalf of the defendant, testified: that he was a resident of Los Angeles, twenty-seven years [39] old; is a resident engineer for the Los Angeles County Road Department, and has been for five years and a half; is now stationed on Western Avenue and has charge of the road oiling there; they use the Monarch machine; is familiar with the defendant's machine; that he was working for the county at the time defendant did some road work around the San Fernando tunnel and was resident engineer on the job; it was the winter of 1912-1913; defendant had the same machine they now have; plaintiff was up there then; the oil came out of the tank and flowed into the pump; had the appearance of a fan-shaped spray; the ap-

(Testimony of H. H. Fillmore.)

pearance of the oil was just simply a spray just like a spray of water or anything, only it was oil—a fan-shape spray; the outlet was a slot; the oil was the shape of the slot and flowed out under pressure,—a solid sheet; the spray was thicker than a sheet of paper when it struck the earth, because the slot was about one-eighth of an inch wide; where it struck the earth it was still a sheet of oil and about six inches wide and thicker than a sheet of paper; that in the machine used by Rogers Brothers on Western Avenue the oil is sprayed under pressure from a pump and the oil comes out in a fan-shape stream about six inches wide and one-eighth inch thick when it hits the ground.

Q. Now, what condition does the oil remain in as to its physical condition, as to its shape and size, between the slot and the ground?

A. In the same condition, I should judge.

Q. The same as what?

A. You say the same as it leaves the spray and when it hits the ground?

Q. No, what is the condition of the oil, the size and shape of it, between the time it leaves the opening in the machine and the time it hits the ground? [40]

A. Well, it is in a fluid state, under pressure, flowing.

Q. Well, is it divided up, or continuous, or what is it in that respect?

A. Continuous, I would say.

On cross-examination Mr. Fillmore testified: Nothing said in the specifications about pressure whatever;

(Testimony of H. H. Fillmore.)

couldn't tell how much oil would be delivered in a space of a minute through a one-eighth inch opening by an inch opening with twenty pounds of pressure; required one gallon of oil to the square yard in the Western avenue job; the faster the machine runs the more oil is delivered;

On redirect examination Mr. Fillmore testified: A thousand gallon tank covers so many square yards which would be so much oil to one square yard; the oil, after coming through the pump can return to the tank without going out of the sprays through a by-pass which is simply a valve at the back end of the tank; that arrangement is used by letting more oil back into the tank.

On recross-examination Mr. Fillmore testified: The delivery slots on the so-called Ward Brothers machine were as he remembers it, approximately an inch long;

**[Testimony of E. F. Godso, for Defendant.]**

E. F. GODSO, called on behalf of defendant, testified that he resided in Los Angeles; was forty-three and superintendent of the Los Angeles County Highways for two years; prior to that was assistant chief engineer of the Los Angeles County Highway Commission for one year; has been with the Los Angeles County roads six years; had charge of the construction of roads; saw [41] defendant's *mahines* applying oil to the roads on Western Avenue about ten days ago; on the San Fernando road two and a half years ago between San Fernando and Newhall Tunnel, on the Crutcher road and on the Wright



(Testimony of E. F. Godso.)

road; it came out of those nozzles in the shape of an inverted V; the nozzles are eight or nine inches above the ground; couldn't say exactly; the V then would be between eight and ten inches high, possibly six inches wide at the bottom; oil comes out of it in a solid sheet; can't see through it at all; it puts on a continuous sheet; the edge of these sheets all meet so that it gives a solid sheet or a solid, continuous application as the truck proceeds; the oil strikes the ground as a sheet; it would gradually unfold itself on the pavement; couldn't state the thickness of the sheet when it hits the ground; when you are putting on a very light coat of oil it is almost transparent; when it is heavy it is opaque; we determine the amount of oil on the street by figuring the area the oil is deposited over by the pump and the number of gallons of oil put on.

**[Testimony of George S. Benson, for Defendant.]**

GEORGE S. BENSON, called on behalf of defendant, testified: he resides in Los Angeles; fifty-two, contractor; has a Monarch machine for oiling roads; also a Ward; the Monarch machine has a nozzle that is wide and spreads out and drops the oil in an inverted V-shape; about two years ago Rogers Brothers did oiling for me on Pacific Boulevard; saw the machine in operation; the oil drops down in what we call a solid sheet; it seems to spread right out on the road; I haven't used the Ward machine for two or three years; at that time they had a round spray that just came down in a kind of a mist rather; they

(Testimony of George S. Benson.)

used more force than we do with this one; more of a vapor. [42]

On cross-examination he states: Mr. George A. Rogers is his sor in law; when you apply by the so-called Monarch machine one-eighth gallon of oil to the square yard you have a very thin and finely divided spray that is pushed down into the earth by pressure owing to your heat; you can see that readily;

On redirect examination he states: It doesn't look like a sheet in the Ward machine; it is more like a vapor.

**[Testimony of James F. Kew, for Defendant.]**

JAMES H. KEW, called on behalf of defendant, testified; that he lives in Inglewood; fifty; from October, 1909 until July, 1913, had been street superintendent for Inglewood; had charge of all road and street oiling in the city; Rogers Brothers did work in Inglewood finished in October or November, 1912, I think; saw the Monarch machine in operation; when the machine was running putting oil on the road when it came down on the macadam it was a thin V shape, an inverted V, and was about six inches wide where it touched the road, it was a thin sheet of oil as it got down to the road it was thinner as the V began to widen out; the sheet was an acute angle at the top, the width of a slot and then came down; the nozzles were about five inches above the road; as the oil left the nozzle of the Ward machine for about three inches it was a little spray perhaps two or three inches wide and then it was thinned out to nothing; it was just in atoms and at the time

(Testimony of James H. Kew.)

it got down to the macadam it was all atomized; the sprays were about eighteen inches from the road; if the wind was blowing hard it came out in small atoms and left streaks on the road. With the Monarch we never had any trouble with the oil blowing at all.  
[43]

On cross-examination he states: The Monarch machine at Inglewood had an attachment six feet wide that carried the atomizer; you can spread oil or water without dividing it up into small particles; were using half a gallon of gravity oil, between eighty-five and ninety per cent asphalt, at about 300 or 350° to the square yard at Inglewood; have never seen water sprayed through a Monarch.

**[Testimony of Earl B. Gilmore, for Defendant.]**

EARL B. GILMORE, called on behalf of the defendant, stated: resides in Los Angeles; twenty-eight; oil producer and refiner and connected with the A. F. Gilmore Oil Company; had experience in distributing oil on roads; had a machine that puts on oil with force, using a Monarch type nozzle; the oil comes out of that nozzle in a fan or V-shape, in a sheet of oil; we elevate the nozzles about six inches from the surface on which we are applying the oil; one individual sheet extends in the neighborhood of twelve inches wide; he saw Rogers Brothers machine when they were fixing the San Vincente Boulevard; between Westgate and Soldiers Home; the oil discharged from the machine came down identically like the ones that we are using; it came down in a sheet and hit the road in a fan shape.

(Testimony of Earl B. Gilmore.)

On cross-examination he states: The sheet from our machines, as it struck the ground is a full eighth of an inch thick; if you are using a very light freely discharging oil, that is, a light oil, spreading a quarter or an eighth of a gallon per square yard, you can not use one of these nozzles in one of our machines. [44]

**[Testimony of Charles R. Brawner, for Defendant (Recalled).]**

CHARLES R. BRAWNER, recalled, testified: he took the photograph introduced as Defendant's Exhibit "E" at Moneta and Western Avenue where Rogers Brothers are improving Western Avenue Wednesday or Thursday of last week.

On cross-examination he states: The photograph, Defendant's Exhibit "E" was taken after the machine was jacked up to show how the oil came out of that machine; Rogers Brothers' Machine, if he remembers correctly, carries fourteen or fifteen atomizers; some of the nozzles strike each other; it is a true picture of the machine.

**[Testimony of George A. Rogers, for Defendant (Recalled).]**

GEORGE A. ROGERS, recalled, testified: there have been no changes at all in the method of working the Monarch oiler and nozzle; entire apparatus is the same as when he first bought it; they had two types; the machine used on Western Avenue is the same as they used when they first put it on the truck except that they broke a few links of chain and renewed those a few times and put in new nozzles; they are



(Testimony of George A. Rogers.)

the same kind of nozzles; same machine they used at Wilmington and the San Fernando Road and east of Clearwater on two county roads; the nozzles that he saw on the Tomer machine at Visalia had a little round hole; it was not spreading oil that day; this was in early part 1909; they were making some changes in it; had a little valve inside it to shut off and control it and to close this little hole up; the nozzles were attached to barrels at a manifold and the manifold is supplied with oil by pipes leading to the tank; there was a steam pump between the tank and the nozzle; they had a boiler with which they ran their pump by steam.

On cross-examination he stated: [45] sometimes defendant put two nozzles on one side extra and sometimes one on either side and sometimes they ran them the way, depending on the width of the application that they wanted, that was the best; sometimes this distributor was made in three sections; you can pump oil through two feet, four feet or six feet and cover up a strip of road so that every application would be according to what they wanted to do. The nozzles set on the truck on about six to eight inches off the ground; they got the extra width by disconnecting between and letting the oil come out of certain nozzles and closing others; you can pump the oil through the middle two-foot section so that the other nozzles are shut off entirely, or you can use either end and in that case in order that you can get the quantity of oil desired they have a regulating valve for the pipes and in that case if they only use a third of the oiler instead of all of it they open *ip*

(Testimony of George A. Rogers.)

the pipes and let it go back into the tank as surplus oil; that is the way they gage it to get the right number of gallons per square yard.

On redirect examination he testified: he was naturally on the Wilmington job a good many different times; not certain whether they put a tank of oil on or not when he was there.

**[Testimony of Gilbert E. Bailey, for Plaintiff  
(Recalled).]**

GILBERT E. BAILEY, recalled, testified: he was familiar with the old-fashioned Studebaker atomizing devices; from that in the old Studebaker, down to the present time, the action of the different methods of applying oil is divided into three classes; first, a mass; second, in atomising; and third, in a thin film; if you are working with a nozzle in a mass effect, like a hose, flooding, you will get very little air mixed with the oil; if you are working with a spray or mist you would get a maximum amount of air mixed with the oil; if you are working with a film or brush-work you would get a large amount of air mixed [46] with the oil—sufficient to thicken and harden it—depending upon the pressure, the speed of the machine and other things of that character.

On cross-examination he states: in regard to the spraying of this heavy asphaltic road oil through any of those nozzles his experiments had been to this extent; there was an attempt to use an asphaltum preparation for getting the grain of a powder explosive, and they used preparations of asphaltum upon those grains, attempting to get an exceedingly

(Testimony of Gilbert E. Bailey.)

thin film, where there would be a perfect film; they did some of that work in experimenting on that and directing it, and tried it on boards and on glass to see how thick the film would be on the glass without applying it to the explosive itself; they used a Bordeaux nozzles, practically the same as this, in all of their experiments; it was the handiest to get; it was the easiest one to purchase and use.

Stipulated a true, complete and satisfactory Statement of the Evidence and to be approved by Court under Equity Rule 75.

FREDERICK S. LYON,  
Solicitor for Plaintiff.  
HARTLEY SHAW,  
Solicitor for Defendant.

Approved under Equity Rule 75.

OSCAR TRIPPET,  
District Judge.

[Endorsed]: No. A-3. United States Circuit Court, Southern District of California, Southern Division. Joseph E. Ward, Plaintiff, vs. Rogers Brothers Company, Defendant. In Equity. Statement of Evidence Under Equity Rule 75. Filed Jan. 27, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [47]

**[Complainant's Exhibit No. 1—Letters Patent No.  
991,043—Process of Making Roadways.]**

No. 991,043.

THE UNITED STATES OF AMERICA.  
TO ALL TO WHOM THESE PRESENTS SHALL  
COME:

WHEREAS, Joseph E. Ward, of Long Beach, California, has presented to the COMMISSIONER OF PATENTS a petition praying for the grant of Letters Patent for an alleged new and useful improvement in PROCESSES OF MAKING ROADWAYS, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of Law in such cases made and provided, and

WHEREAS upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now therefore these LETTERS PATENT are to grant unto the said Joseph E. Ward, his heirs or assigns for the term of SEVENTEEN years from the second day of May, one thousand nine hundred and eleven, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed at the City of Washington this second day of May, in the year of our Lord one thou-



sand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

[Seal]

C. C. BILLINGS,

Acting Commissioner of Patent. [48]

[Endorsed]: Ward vs. Rogers Bros. Co. No. A-3—Eq. Compl's Exhibit No. 1. Filed Nov. 23, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.

[Endorsed]: In the Superior Court of the State of California in and for the County of Los Angeles. No. B 10,042. J. E. Ward vs. John R. Ott Contracting Co. Plaintiff's Exhibit 3. Filed Oct. 6, 1914. H. J. Lelande, Clerk. By E. E. Ekdale, Deputy.  
[49]

J. E. WARD.  
PROCESS OF MAKING ROADWAYS.  
APPLICATION FILED MAR. 14, 1910.

991,043.

Patented May 2, 1911.

2 SHEETS-SHEET 2.

Fig. 2

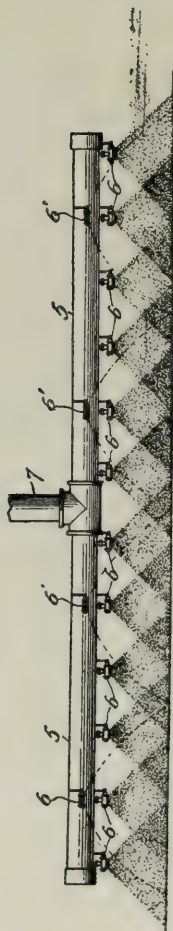
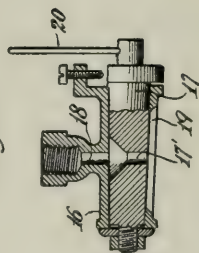


Fig. 3



Witnesses-  
Louis W. Gray  
Lute D. Rte.

Inventor  
Joseph E. Ward  
By *James H. Haeckley*  
att'y

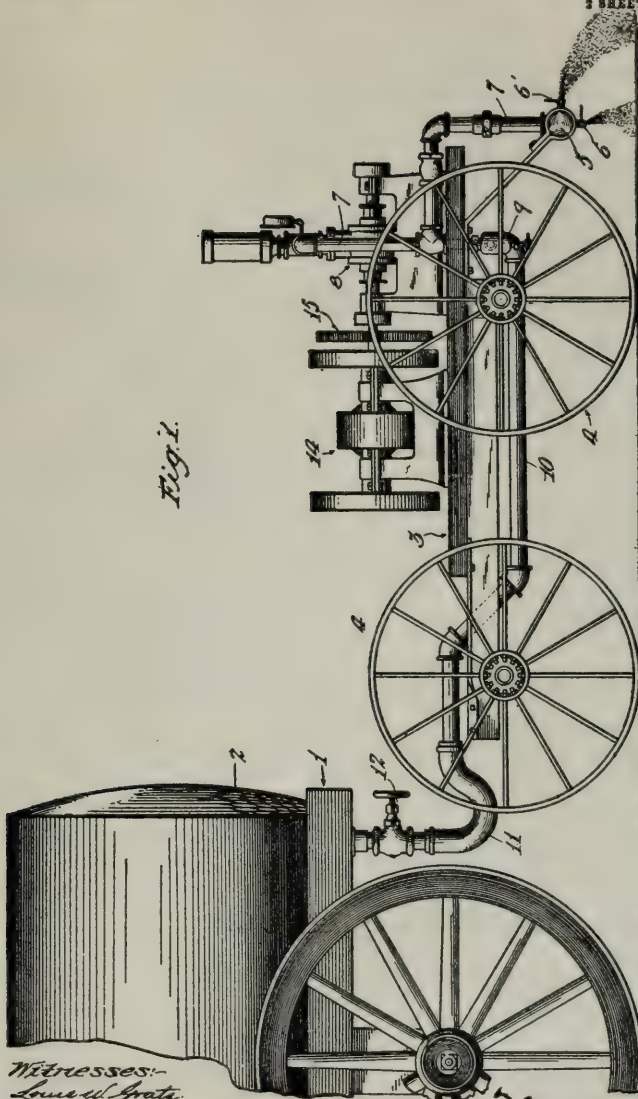
J. E. WARD.  
PROCESS OF MAKING ROADWAYS.  
APPLICATION FILED MAR. 14, 1910.

991,043.

Patented May 2, 1911.

2 SHEETS-SHEET 1.

Fig. 1.



Witnesses:  
Louis W. Grady  
L. D. H. H.

Inventor  
Joseph E. Ward  
Lawrence J. Ward  
attorney

## UNITED STATES PATENT OFFICE.

JOSEPH E. WARD, OF LONGBEACH, CALIFORNIA.

PROCESS OF MAKING ROADWAYS.

991,043.

Specification of Letters Patent.

Patented May 2, 1911.

Application filed March 14, 1910. Serial No. 549,347.

*To all whom it may concern:*

Be it known that I, JOSEPH E. WARD, a citizen of the United States, residing at Longbeach, in the county of Los Angeles and State of California, have invented a new and useful Process of Making Roadways, of which the following is a specification.

The invention relates to a process for making roadways by application of oil to sand, gravel or earth forming a compact, dustless and waterproof mixture or combination.

The main object of the present invention is to reduce to a minimum the amount of oil required in making the roadway.

Another object of the invention is to enable the roadway to be made by application of oil thereto in a special manner without necessity of special mechanical treatment, such as stirring and rolling the ground after the application of the oil to finish the surface; the ordinary traffic being alone sufficient to compact and mix the oil with the solid matter of the roadway.

A further object of the invention is to provide for application of the oil to the roadway in such manner that there will be no objectionable deposit of liquid oil in pools or masses, such as would interfere with traffic.

Another object of the invention is to expedite the conversion of the oil to a solid condition by increasing the state of division thereof and thereby correspondingly increasing the rapidity of oxidation. In the formation of an oiled road the gradual oxidation of the oil by the action of the air is an important feature in the conversion of the road surface to a hard resistant condition and my invention provides for exposing the oil to the air in the most effective manner for such oxidation.

The process is specially applicable in connection with a roadway whereon there is a considerable deposit of dust, and in such a connection the process has the further advantage of immediately reducing the surface of the roadway to a dustless condition and of utilizing the dust as an important constituent in the road surface.

The process consists essentially in applying the oil to the road surface in a condition of suspension in the air in such manner that the oil as it settles into contact with the road surface permeates the road surface by reason of its fine state of division; forming a coating over each solid particle in the

road surface; so that in the stirring and compression of the road surface by the ordinary traffic these solid particles will be compacted together and will be caused to form a waterproof compact mass, the oil acting as a binder.

The accompanying drawings illustrate an apparatus suitable for carrying out the invention, and referring thereto:

Figure 1 is a side elevation of the apparatus. Fig. 2 is a rear elevation of the atomizing head or oil distributor. Fig. 3 is a longitudinal section of one of the atomizing nozzles.

1 designates an oil supply means consisting, for example, of an oil wagon carrying a tank 2, and 3 designates a truck connected to said oil wagon to be drawn thereby, said truck having running wheels 4 and carrying means for atomizing and distributing the oil.

The distributor means comprises a distributor head or pipe 5 extending transversely at the rear of the truck 3 and provided with a series of atomizing nozzles 6 at various points along the length thereof and with a supply pipe 7 leading to the outlet of a pump 8 whose inlet is connected to a pipe 10 connected by a flexible hose 11 and valve 12 in the oil tank 2. An engine or motor of any suitable character, indicated at 14, is connected by driving mechanism 15 to operate the pump 8. Each of the atomizing nozzles 6 may comprise a tubular casing 16, a plug 17 fitting therein and having a transverse port 17' communicating with an inlet opening 18 at one side of the casing and an outlet opening 19 at the other side of the casing. The delivery end of the port 17' is preferably flared and the outlet opening 19 is made sufficiently large to allow passage of the flaring blast of atomized oil from the nozzle. Handle means 20 are provided for each valve plug 17. An extra series of nozzles 6' may be provided at the rear of the distributing pipe for use in case an extra supply of oil is needed. A by-pass may be provided around the engine provided with a valve 9.

The process may be carried out as follows: The oil, which is preferably crude petroleum or residuum, of proper gravity and preferably with asphaltum base, is supplied in the tank 1 and being preferably subjected to a preliminary heating before being charged into said tank, so as to render the oil suffi-



991,043

ciently fluid for atomization. The oil tank and the truck being drawn over the surface of the roadway, the motor 14 is set in operation to drive the pump 8 and pump the oil from the oil tank 1 and pipes 11 and 10, through the delivery or outlet pipe 7 and distributor pipe 5. The atomizing nozzles 6 are opened by their handle means 20 more or less to supply oil according to the condition of the roadway, the amount of dust thereon, etc., so as to provide for a supply of oil commensurate with the absorbing capacity of the roadway, only so much being supplied as can be taken up by the dust and the porous surface of the roadway as a superficial film on each solid particle or surface without the formation of pools or visible masses of oil. In case an extra supply of oil is needed, the valves 6' are opened distributing the oil as indicated in dotted lines in Fig. 2, in addition to the distribution by the nozzles 6. The oil is forced by the pump 8 through the atomizing nozzles under sufficient pressure to insure atomization, and the openings for the atomizing nozzles are sufficiently contracted to insure that as the oil issues under such pressure it will on encountering the air be broken up into such fine particles that it tends to remain suspended in the air for an appreciable length of time forming a mist or mixture of air and minute particles of oil. This operation of finely dividing the oil to form a mixture with air is well understood under the term "atomization," and the function of the operation in my process is to render the oil capable of permeation or diffusion into and between the solid particles and surface of the roadway, the mixture of air and atomized oil having in this respect the properties of a gas as distinct from those of a liquid or solid.

Where oil is deposited on the roadway by means of the ordinary sprinkling nozzles or by means of forcing the oil in a solid stream into violent contact with the surface of the roadway, the oil tends to collect in pools and has to be violently forced into the interstices of the roadway by mechanical action for the reason that roadway surface dust particles, etc., have no capillary attraction for the oil but rather tend to repel the same until they have been actually wetted with it, but by reducing the oil to an atomized condition and suspending it in the air, it is caused to enter the porous surface of the roadway and to penetrate between the dust particles by a process of diffusion; and when it is deposited upon such surface or particles, it is in the final condition of distribution desired and does not require further mechanical stirring or pressure except to compact the particles together. As the oil supply and atomizing means pass over the surface of the roadway, it, therefore, leaves on the roadway

a deposit of oil substantially covering each and every particle of dust and extending appreciably into the loose or porous dust on the surface of the roadway, the deposit being substantially uniform throughout and serving at once to lay the dust and to give a binding surface for each particle, whereby it is adapted to serve as a constituent of the road surface in the subsequent traffic over the surface by wheeled vehicles, etc., the particles so coated or pressed together forming a compact, dense, and substantially uniform waterproof road surface.

In the interval which elapses between the ejection of the oil from the nozzles and the final compacting of the road surface by the traffic, the oil is maintained in a condition of maximum exposure to the air, thereby expediting the hardening or setting of the oil, both by reason of release of the more volatile constituents and by oxidation.

When the oil is suspended in the air in atomized condition, it will part with the greater portion of its most volatile constituents and lessen the time of evaporation after the oil is deposited on the particles of the road surface, it being deposited in an extremely thin layer or coating, each particle of the atomized oil being in fact deposited as a separate unit and maintaining its exposure to the air until the particles are compacted together as stated. While the oil particles are thus exposed to the air and in contact with the dust and road particles, there is produced a gradual chemical action, converting the oil to a more solid or harder form and binding or combining it with the solid elements of the road surface, this operation proceeding until the final compacting of the road as stated.

In practice the roadways treated by my process are free from all stickiness or slush and can be used by vehicles without any of the material adhering to the wheels, while pedestrians may walk upon or over the same without the oil and road material becoming attached to their shoes, and being carried thereby onto sidewalks or into buildings, thereby effecting a large amount of damage to property situated adjacent to such roadways.

Heretofore roadways freshly treated with crude asphaltum base oil have generally been avoided by vehicles and pedestrians until the oil has been exposed to the action of the air and sun for some considerable length of time and until such oil had lost the greater portion of the volatile oils therefrom by evaporation and oxidation, but by the use of my process a roadway may be used immediately after the application of oil without danger of damaging any article.

What I claim:

1. The process of making a roadway which consists in atomizing oil in contact with air,

in such manner that the oil tends to remain suspended in the air for an appreciable time, bringing the atomized oil and air into contact with a porous road surface, causing the oil to permeate the porous road surface while still in atomized condition, and causing the atomized oil to be deposited on the material of the road surface while said material is agitated and partly suspended.

2. The process of making a roadway which consists in atomizing oil in contact with air, maintaining the oil in atomized condition and suspended in the air an appreciable time prior to bringing it into contact with a porous road surface, causing the deposit of at-

omized oil on the road surface in a thin layer of atomized oil particles, thereby maintaining the maximum surface of exposure of the oil to contact with the air and with the material of the roadway for hardening of the oil and binding the same to the road material by oxidation.

In testimony whereof, I have hereunto set my hand at Los Angeles, California, this 5th day of March, 1910.

JOSEPH E. WARD.

In presence of—

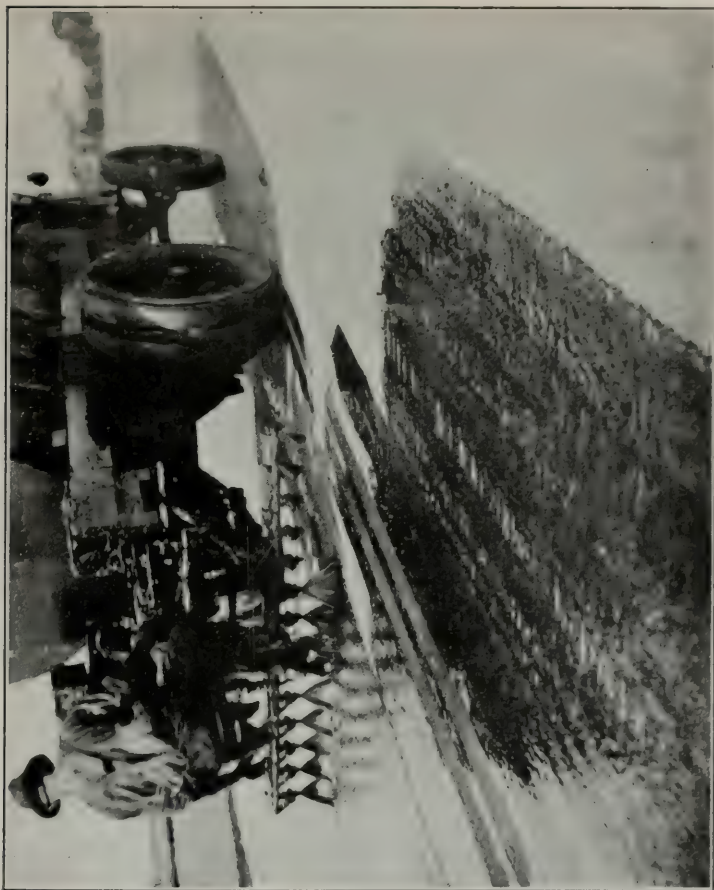
ARTHUR P. KNIGHT,  
FRANK L. A. GRAHAM.

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Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

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[Complainant's Exhibit No. 2—Photograph.]



[Endorsed]: Rogers Bros. Auto Truck Spraying Oil With Monarch Distributor on Extension of Harbour Boulevard North of Wilmington, L. A. Mch. 1913. A3 Eq. Compls. Exh. 2. Filed Nov. 23, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [51]

**[Complainant's Exhibit No. 3—Photograph.]**

[Endorsed]: A3 Eq. Compl. Exh. 3. Filed Nov. 23, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Rogers Bros. Auto Truck Spraying Atlas Oil on Connor's Job, Clearwater, Jan. 2d, 1913. (Hodge made this picture.) [52]



[Defendant's Exhibit "C"—Photograph.]



[Endorsed]: Ward vs. Rogers Bros. Co. No. A3  
Eq. Defts. Exhibit No. "C." Filed Nov. 23, 1915.  
Wm. M. Van Dyke, Clerk. By Leslie S. Colyer,  
Deputy Clerk. [53]

**[Petition for Appeal.]**

*United States District Court, Southern District of  
California, Southern Division.*

IN EQUITY—No. A-3.

JOSEPH E. WARD,

Plaintiff,

vs.

ROGERS BROTHERS COMPANY,

Defendant.

The complainant in the above-entitled suit, conceiving himself aggrieved by the Final Decree made and entered by said Court in the above suit on the 2d day of December, 1915, dismissing complainant's Bill of Complaint, comes now by Frederick S. Lyon, Esq., his solicitor, and petitions said Court for an order allowing complainant to prosecute an appeal from said decree to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the Laws of the United States in that behalf made and provided, and also for an order fixing the sum of security which complainant shall give and furnish upon such an appeal.

FREDERICK S. LYON,

Solicitor for Complainant.

[Endorsed]: No. A-3—Eq. United States District Court, Southern District of California, Southern Division. Jos. E. Ward vs. Rogers Brothers Co. Petition for Appeal. Filed Jan. 11, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [54]

*United States District Court, Southern District of  
California, Southern Division.*

IN EQUITY—No. A-3.

JOSEPH E. WARD,

Plaintiff,

vs.

ROGERS BROTHERS COMPANY,

Defendant.

**Assignments of Error.**

COMES NOW complainant above named and specifies and assigns the following as the errors upon which he will rely upon his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of December 2d, 1915, dismissing complainant's Bill of Complaint:

I. Error in not adjudging and decreeing that complainant was the original, first and sole inventor of the "Process of Making Roadways" described and claimed in letters patent 991,043, and that said letters patent are good and valid in law, and complainant the owner thereof.

II. Error in not adjudging and decreeing that defendant has infringed said letters patent and purposes to continue said infringement thereof.

III. Error in not adjudgment that complainant have the relief against defendant prayed for in said Bill of Complaint. [55]

In order that the foregoing Assignments of Error may be and appear of record, complainant presents the same to the Court and prays that such disposi-

tion may be made thereof as is in accordance with the laws of the United States.

WHEREFORE, the said complainant prays that the said decree of this Court made and entered on December 2d, 1915, be reversed and that the said Court be directed to enter an order setting aside said decree and ordering, adjudging and decreeing to complainant the relief against defendant prayed in said Bill of Complaint.

All of which is respectfully submitted.

FREDERICK S. LYON,  
Solicitor for Complainant.

[Endorsed]: No. A-3—Eq. United States District Court, Southern District of California, Southern Division. Joseph E. Ward vs. Rogers Brothers Co. Assignments of Error. Filed Jan. 11, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [56]

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**[Order Allowing Appeal, and Fixing Amount of Bond.]**

*United States District Court, Southern District of California, Southern Division.*

IN EQUITY—No. A-3.

JOSEPH E. WARD,

Plaintiff,

vs.

ROGERS BROTHERS COMPANY,

Defendant.

In the above-entitled suit the complainant having filed his petition for an order allowing an appeal



from the decree of this court made and entered in this suit on December 2d, 1915, together with Assignments of Error;

Now, on motion of Frederick S. Lyon, Esq., Solicitor for complainant, it is ordered that said appeal be and hereby is allowed to complainant, to the United States Circuit Court of Appeals for the Ninth Circuit from the said decree dismissing complainant's Bill of Complaint, and that the amount of complainant's bond on said appeal be and the same is hereby fixed in the sum of Two Hundred Fifty Dollars.

It is further ordered that upon the filing of such security a certified transcript of the records and proceeds herein be forthwith transmitted to said United States Circuit Court for the Ninth Circuit in accordance with the statutes and the Equity Rules of the Supreme Court of the United States and that such bond or security shall act as a supersedeas of the cost judgment herein.

Dated January 11th, 1916.

OSCAR A. TRIPPET,  
District Judge. [57]

[Endorsed]: No. A-3—Eq. United States District Court, Southern District of California, Southern Division. Jos. E. Ward vs. Rogers Brothers Co. Order Allowing Appeal. Filed Jan. 11, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [58]

*United States District Court, Southern District of  
California, Southern Division.*

JOSEPH E. WARD,

Plaintiff,

vs.

ROGERS BROTHERS COMPANY,

Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That the United States Fidelity & Guaranty Co. of Baltimore, Md., a corporation organized and existing under the laws of the State of Maryland and duly licensed to transact business in the State of California, is held and firmly bound unto Rogers Brothers Company, defendant in the above-entitled suit, in the penal sum of Two Hundred Fifty Dollars (\$250) to be paid unto the said Rogers Brothers Company, its successors and assigns for which payment well and truly to be made The United States Fidelity & Guaranty Co. of Baltimore, Md., binds itself, its successors and assigns firmly by these presents.

Sealed with the corporate seal and dated this 11th day of January, 1916.

The condition of the above obligation is such that whereas the said Joseph E. Ward, plaintiff in the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree made, rendered and entered December 2, 1915, by the District Court of the United States for the Southern District of Califor-

nia, Southern Division, [59] in the above-entitled cause dismissing plaintiff's Bill of Complaint.

NOW, THEREFORE, the condition of the above obligation is such that if said Joseph E. Ward shall prosecute his appeal to effect and answer all costs which have been or may be adjudged against him if he fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

THE UNITED STATES FIDELITY &  
GUARANTY CO. OF BALTIMORE, MD.

[Seal]

By H. W. SCHRODER,

Attorney in Fact.

State of California,

County of Los Angeles,—ss.

On this 11th day of January in the year one thousand nine hundred and sixteen, before me, Hallie D. Winebrenner, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared W. H. Schroder known to me to be the duly authorized attorney in fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said W. H. Schroder duly acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Seal]            HALLIE D. WINEBRENNER,  
Notary Public in and for Los Angeles County, State  
of California.    [60]

[Endorsed]: No. A-3. United States District Court, Southern District of California, Southern Division. Joseph E. Ward, Plaintiff, vs. Rogers Brothers Company, Defendant. Bond on Appeal. The Within Bond and Surety Thereon is Hereby Approved This — day of January, 1916. Oscar A. Trippet, U. S. District Judge. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Plaintiff. Filed Jan. 12, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [61]

State of California,  
County of Los Angeles,—ss.

Sully Russo, being first duly sworn, deposes and says, that he is of lawful age and a draftsman in the employ of Frederick S. Lyon of Los Angeles, California; that on January 12, 1916, he served the attached praecipe upon Hartley Shaw, an attorney for the defendant, by handing to and leaving with said Hartley Shaw a true and correct copy thereof.

SULLY RUSSO.

Subscribed and sworn to before me, a notary public, this 20th day of January, 1916, at Los Angeles, California.

[Seal]            WINFIELD D. STARK,  
Notary Public Within and for Los Angeles County,  
State of California.    [62]



UNITED STATES OF AMERICA.

*District Court of the United States, Southern  
District of California, Southern Division.*

CLERK'S OFFICE.

IN EQUITY—No. A-3.

JOSEPH E. WARD,

Plaintiff,

vs.

ROGERS BROTHERS COMPANY,

Defendant.

**Praeceptum [for Transcript of Record.]**

To the Clerk of Said Court:

Sir: Please issue as a Transcript of Record on Appeal in this suit a copy of each of the following, duly certified as required by law, and in accordance with the Equity Rules, on plaintiff's appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

The Bill of Complaint;

The Answer of Defendant;

The decree dismissing the Bill;

The paper exhibits as offered in evidence and referred to in the "Statement of Evidence";

The "Statement of Evidence" under Equity Rule 75;  
[63]

Petition for Order Allowing Appeal;

Assignments of Error;

Order allowing Appeal;

Bond on Appeal.

FREDERICK S. LYON,

Solicitor for plaintiff.

[Endorsed]: No. A-3. U. S. District Court, Southern District of California, Southern Division. Joseph E. Ward vs. Rogers Bros. Co. Praeipe for Transcript on Appeal. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Received a copy of the within Praeipe this 12th day of January, 1916.

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Solicitor for Defendant. [64]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, in and for  
the Southern District of California, Southern  
Division.*

No. A-3—EQUITY.

JOSEPH E. WARD,

Complainant,

vs.

ROGERS BROS. COMPANY,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing sixty-four (64) typewritten pages, numbered from 1 to 64, inclusive, to be a full, true and correct copy of the Bill of Complaint, Answer, Decree, Statement of Evidence, Complainant's Exhibits Nos. 1, 2 and 3, Defendant's Exhibit No. "C," Peti-

tion for Appeal, Assignments of Error, Order Allowing Appeal, Bond on Appeal, and Praecipe for Preparation of Transcript of Record in the above and therein-entitled cause, and that the same together constitute the record upon the appeal of Joseph E. Ward, herein, in accordance with the Praecipe for Preparation of Transcript filed in my office on behalf of the Appellant by his solicitor of record.

I do further certify that the cost of the foregoing Transcript Upon Appeal is \$34.20/100, the amount whereof has been paid me by Joseph E. Ward, the appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 7th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of our Independence, the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,  
Clerk of the District Court of the United States of  
America, in and for the Southern District of  
California.

By Leslie S. Colyer,  
Deputy Clerk.

[Ten Cent Internal Revenue Stamp Canceled  
4/7/16. L. S. C.]

[Endorsed]: No. 2775. United States Circuit Court of Appeals for the Ninth Circuit. Joseph E. Ward, Appellant, vs. Rogers Brothers Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed April 10, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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**[Order Under Rule 16, Extending Time to April 1,  
1916, to Docket Cause and File Record.]**

*In the United States Circuit Court of Appeals, Ninth  
Judicial Circuit.*

JOSEPH E. WARD,

Appellant,

vs.

ROGERS BROTHERS COMPANY,

Appellee.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellant to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of April, 1916.



Dated at Los Angeles, California, February 8th,  
1916.

TRIPPET,  
U. S. District Judge.

[Endorsed]: No. —. United States Circuit  
Court of Appeals for the Ninth Circuit. Joseph E.  
Ward, Appellant, vs. Rogers Brothers Company, Ap-  
pellee. Order Extending Time to File Record.  
Filed Feb. 10, 1916. F. D. Monckton, Clerk.

**[Order Under Rule 16, Extending Time to July 1,  
1916, to Docket Cause and File Record.]**

*United States Circuit Court of Appeals, for the  
Ninth Circuit.*

(No. A-3—EQ.)

S. D.

JOSEPH E. WARD,

Appellant,

vs.

ROGERS BROTHERS COMPANY,

Appellee.

Good cause appearing therefor, it is hereby or-  
dered that the time within which appellant in the  
above-entitled action may file record and docket cause  
in the United States Circuit Court of Appeals for the  
Ninth Circuit be extended to and including the 1st  
day of July, 1916.

Los Angeles, 3/28, 1916.

TRIPPET,  
District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Joseph E. Ward, Appellant, vs. Rogers Brothers Company, Appellee. Order Extending Time to Docket Cause and File Record. Filed Apr. 3, 1916. F. D. Monckton, Clerk.

No. 2775. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to July 1, 1916, to File Record thereof and to Docket Case. Refiled Apr. 10, 1916. F. D. Monckton, Clerk.

10  
No. 2775.

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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Joseph E. Ward,

*Appellant,*

*vs.*

Rogers Brothers Company,

*Appellee.*

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APPELLANT'S BRIEF.

---

FREDERICK S. LYON,

*Solicitor for Appellant.*





**No. 2775.**

IN THE  
**United States**  
**Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT.**

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**Joseph E. Ward,**

*Appellant,*

*vs.*

**Rogers Brothers Company,**

*Appellee.*

---

**APPELLANT'S BRIEF.**

This is an appeal from the decree of the District Court of the United States for the Southern District of California, Southern Division, dismissing appellant's bill of complaint charging infringement of letters patent No. 991,043, dated May 2, 1911, for process of making roadways.

The trial court did not file any opinion. The case was tried in open court, and at the conclusion, after hearing the argument of counsel, the bill of complaint was dismissed on the ground of non-infringement.

The assignments of error appear on page 63 of the Transcript.

The patent in suit appears on pages 54-58 of the Transcript of Record.

As stated in the patent:

“The main object of the present invention is to reduce to a minimum the amount of oil required in making the roadway.”

As shown by the testimony of Mr. Ward [Transcript page 16], prior to the introduction of Mr. Ward's process the specifications for road building throughout California required as high as two and one-fourth gallons of oil to the square yard; since the introduction of Mr. Ward's process the specifications generally throughout California require a gallon or less to the square yard.

The difference in saving due to the Ward process, therefore, is a saving of at least one-half the cost of the oil. The testimony of Mr. Ward is corroborated by the testimony of other witnesses in this regard. As to this fact there is no dispute in this case and the defendant in its use of the infringing process has sometimes reduced the amount of oil applied even as low as one-eighth of a gallon of oil to the square yard [Transcript of Record page 46].

A further object of the Ward invention consists in finely dividing or comminuting the oil and discharging it downwardly under pressure against the surface of the roadway in such manner that as the oil is comminuted or broken up it is surrounded by air so that the particles of oil are suspended in an envelope of

air, thus providing for the quick oxidation of the oil and also insuring each of the particles of the road surface being surrounded by a particle of oil, the envelope of air surrounding such particle of oil insuring the adhesion of the oil to the road surface particles.

The specification of the Ward patent states one of the objects

“is to expedite the conversion of the oil to a solid condition by increasing the state of division thereof and thereby correspondingly increasing the rapidity of oxidation. In the formation of an oiled road the gradual oxidation of the oil by the action of the air is an important feature in the conversion of the road surface to a hard resistant condition, and my invention provides for exposing the oil to the air in the most effective manner for such oxidation.” [Transcript page 56, column 1, lines 30-41.]

“The process consists essentially in applying the oil to the road surface in a condition of suspension in the air in such manner that the oil, as it settles into contact with the road surface, permeates the road surface by reason of its fine state of division, forming a coating over each solid particle in the road surface, so that in the stirring and compression of the road surface by the ordinary traffic these solid particles will be compacted together and will be caused to form a waterproof compact mass, the oil acting as a binder.” [Transcript page 56, lines 50-61.]

In the drawings of the Ward patent are shown an apparatus or machine by means of which the process

*may be* carried out or performed, and in Fig. 2 of the drawings is illustrated the comminution of the oil and its projection downward under pressure so that as the machine is moved forward air is brought into contact with the oil particles and thereby the oil is surrounded by an envelope of air, which both insures the quick oxidation of the oil and also insures the oil readily adhering to each particle of the road surface, the envelope of air overcoming the tendency of the particles of the road to repel the oil and effectively acting to cause the quick adherence of such roadway particles with the oil. This action might be likened, for illustration, to that of a magnet, the envelope of air so surrounding the oil causing the particles of the roadway to actually draw the oil to them, instead of repelling such particles, as would be the case if the proper amount of air were not commingled with the oil and projected into the roadway surface with the oil.

In compliance with section 4888 of the Revised Statutes, Mr. Ward in his patent has both described his process and the *best* mode or manner of performing the same. This "*preferred form*" of the invention or preferable manner of performing the process is set forth on page 56 of the Transcript, column 2, lines 105 *et seq.*, as follows:

"The process *may be* carried out as follows: The oil, which is preferably crude petroleum or residuum, of proper gravity and preferably with asphaltum base, is supplied in the tank 1 and being preferably subjected to a preliminary heating before being charged into said tank, so as to render the oil sufficiently fluid for atomization. The oil



tank and the truck being drawn over the surface of the roadway, the motor 14 is set in operation to drive the pump 8 and pump the oil from the oil tank 1 and pipes 11 and 10, through the delivery or outlet pipe 7 and distributer pipe 5. The atomizing nozzles 6 are opened by their handle means 20 more or less to supply oil according to the condition of the roadway, the amount of dust thereon, etc., so as to provide for a supply of oil commensurate with the absorbing capacity of the roadway, only so much being supplied as can be taken up by the dust and the porous surface of the roadway as a superficial film on each solid particle or surface without the formation of pools or visible masses of oil. In case an extra supply of oil is needed, the valves 6<sup>1</sup> are opened, distributing the oil as indicated in dotted lines in Fig. 2, in addition to the distribution by the nozzles 6. The oil is forced by the pump 8 through the atomizing nozzles under sufficient pressure to insure atomization, and the openings for the atomizing nozzles are sufficiently contracted to insure that as the oil issues under such pressure it will, on encountering the air, be broken up into such fine particles that it tends to remain suspended in the air for an appreciable length of time, forming a mist or mixture of air and minute particles of oil. This operation of finely dividing the oil to form a mixture with air is well understood under the term 'atomization,' and the function of the operation in my process is to render the oil capable of permeation or diffusion into and between the solid particles and surface of the roadway, the mixture of air and atomized oil having in this respect the properties of a gas as distinct from those of a liquid or solid."

Fig. 2 of the drawings of the Ward patent [Record page 54] shows the manner of delivery and discharge of the oil in accordance with Mr. Ward's process. The discharge nozzles or sprays 6 are directed directly downward toward the road surface. As the oil is discharged under pressure, i. e., forced by the pump 8, the oil is driven into the surface of the road. As clearly illustrated in Fig. 2 of the drawings, the oil issues from the nozzles 6 in a thin fan-shaped sheet. As the oil expands laterally from the nozzles, it must occupy more space than when contained within the pipes above the nozzles. In order to so occupy more space, the oil must expand, i. e., be divided up into particles. It is obvious that the amount of absolute separation, or the distance of the particles from each other, will depend in degree upon the distance of the discharge nozzles from the surface of the road; also in degree the question of time between the discharge and the forcible projection of the atomized oil in between the particles of the road surface will also depend upon the distance of the discharge nozzles above the road surface. As the apparatus or machine is being moved forward over the road surface all the time, it is obvious that the film or thin fan-shaped sheet of oil is furnished at all times with a large quantity of air so that each particle of oil is surrounded with air and each particle takes up air and carries such air with it into the road.

It is obvious that inasmuch as the thin sheet or film of oil is forcibly projected onto or against the surface of the road there can be no suspension of the oil in the air in the sense that it floats in the air. If

the particles of oil floated in the air, it could not be properly said that they were driven on to the road surface. As we shall see hereafter when referring to the abandoned experiment of Mr. Hatfield, it was found in actual use to be totally impractical to discharge the oil in a finely divided state out into the air and permit it to drop on to the road surface. Mr. Ward's conception was to force the oil against and into the particles of the road surface. But his conception went further than this,—it was to divide up the oil into an atomized or broken condition so that the particles of oil carried with them air, and it is in this sense, and this sense only, that the oil is suspended in the air by the Ward process.

Fig. 2 of the drawings of the Ward patent totally destroy any contention that Mr. Ward's conception was to permit the finely divided particles of oil to be "suspended" in the air in the sense that the oil particles floated on the air. Fig. 2 shows the forcible projection downward of the oil and the forcible projection downward of the oil under pressure prohibits any suspension of the oil in the air in this sense. A proper understanding of this feature of the Ward process is necessary to the proper construction of the Ward patent. Not only have we the showing of the drawings of the Ward patent to throw light upon the true meaning of the suspension of the oil particles in the air, but we have the testimony of both Mr. Ward and of Prof. Gilbert E. Bailey. Mr. Bailey has been in charge of the Department of Geology in the University of Southern California for some years. He is a man of wide

experience in chemical and geological work, and has given particular attention to the subject of organic and inorganic chemistry for four or five years. He has studied asphaltum oils and given considerable attention for a period of years to the use of asphaltum oils in road building. He has seen the Ward process in use by both Mr. Ward and the defendant company. His testimony in regard to this is found particularly on pages 20-22 of the Transcript of Record. He says that in the Ward process the oil is suspended in the air in two senses. Mr. Bailey testifies:

“The oil issuing from the nozzle passing vertically downward passes through ten to twelve inches of air. In that passage, in one sense, it is suspended in the air the same as any body moving in the air—a cannon ball or a bullet. The oil passing from the nozzles down interferes with the air in passing through it so that there is a tendency to cut the particles of the oil with air. Now, when the oil strikes the ground with the force given by the pump, it penetrates to a certain degree the dust or dirt of the surface and mixes with that dust, *and the air* that it carries down in that passage is held in those spaces, and to that extent is mixed or suspended with the air. In other words, the air when brought in contact with the particles of oil so that the oil absorbs it and operates to oxidize, the effect being that the film that is put on the road is thickened and hardened. In regard to the oxidation, I notice in going behind those machines and as shown in the photographs that you can see through the film. As it comes down it is transparent. Therefore it must be exceedingly thin at those transparent points, and the particles



in it must be of very narrow diameter. That film in coming down under pressure, *the very fact that they branch out in a fan shape, shows that they rebound—that is, there is a separation which would facilitate the mixing of the air with the oil,* and as the oil comes down vertically with force it is also moving forward, so that the downward rush would tend to create a vacuum down, in drawing air against this thin film; and as it moves forward the air comes in contact with it. The thinness of the film seemed to me in watching the machine, and its fan shape, and the force it came down with, seemed to be its peculiarities as distinguished from sprinkling or flowing from a spout, and so on.

“The breaking up of the oil into thin particles or sheets and the development thereof in the air brings a greater quantity of air in a lesser time in contact with the oil, increasing oxidation; as another illustration of an envelope of substance about crude oil is the common one of water and oil that we have so frequently at the oil wells. Water comes with the oil and the particles of oil fill with water and it is difficult to separate the two; such body of oil and water is similar to the body of oil and air as thus projected downward into the air by the process of this patent; the oil striking the ground with force and forced into the roadway surface has a tendency to carry the air down and hold it there, and when it is so held it is really quite difficult to separate it in any form.”

It is clear from the specification of the Ward patent that the term “suspended in the air” means that the particles of oil shall be suspended in air when pro-

jected in between the particles of the road surface so that the oxidation will be rapid and the natural tendency of the road particles to repel the oil overcome. This is made clear by reference to the Ward specification [Transcript page 57, column 2, line 43], where it is said:

“Where oil is deposited on the roadway by means of the ordinary sprinkling nozzles *or* by means of forcing the oil in a solid stream into violent contact with the surface of the roadway, the oil tends to collect in pools and has to be violently forced into the interstices of the roadway by mechanical action *for the reason that roadway surface dust particles, etc., have no capillary attraction for the oil but rather tend to repel the same* until they have been actually wetted with it, *but by reducing the oil to an atomized condition and suspending it in the air*, it is caused to enter the porous surface of the roadway and to penetrate between the dust particles by a process of diffusion.”

It is obvious that this portion of the specification cannot refer to suspending the oil in the air in the sense of the oil floating on the air, but refers to suspension or surrounding of the oil with the air while the oil and air are together in between the road surface particles. It is the oil and air that are “caused to enter the porous surface of the roadway.”

This interpretation of the meaning of the suspension of the oil in the air is also the only one which is consistent with the Ward specification [Transcript page 56, lines 50-54], where it is stated that:

“The process consists essentially in applying the oil to the road surface in a condition of suspension in the air,” etc.

To say that the oil is suspended in the air in the sense of floating thereon or therein and being suspended from the action of gravity by the air,—hence held from the ground, would prohibit such oil being applied “*to the road surface* in a condition of suspension in the air.” If the oil were suspended in the air in such sense it would not be applied *to the road surface*. If, however, this be interpreted in the chemical sense of suspension the meaning is clear and true and all the above references to the specification agree in meaning.

The interpretation thus placed upon this term “suspension” by Mr. Ward and by Prof. Bailey brings out the chemical action sought by Mr. Ward, i. e., the condition required for rapid *oxidation* of the oil and road material to form a “compact, dense and substantially uniform waterproof surface.” [Ward Patent Specification, Record page 57, lines 76-77.]

It is of course obvious that the process may be applied to its fullest utility or in part, depending upon the degree of atomization or comminution of the oil, due to the distance the delivery sprays are arranged above the road surface; the character or density of the oil; the degree of temperature of the oil; its fluidity, etc. But the essential with all other conditions is the chemical suspension of the oil in air so that the natural tendency of the earth matter to repel the oil is

eradicated and the oil will readily adhere to the particles of the road surface and rapid oxidation take place.

In this connection and in approaching the consideration of the claims of the Ward patent, it is necessary to bear in mind the well-settled principle of law that

“In a case of doubt, where the claim is fairly susceptible of two constructions, that one will be adopted which will reserve to the patentee the actual invention.”

McLain v. Ortmeier, 141 U. S. 425.

“The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute or by the application of artificial rules of interpretation.”

Topliff v. Topliff, 145 U. S.

As will be seen from the evidence, Mr. Ward was the first to conceive of the process of atomizing oil in contact with the air in such manner that the oil tended to remain suspended or surrounded with a sufficient quantity of air to cause rapid oxidation, discharging such oil through the air directly downward upon the road surface and into the same, carrying with it the air, surrounding the oil particles, in sufficient quantity and intimacy to cause ready adhesion of the oil to the road particles, thereby overcoming the natural tendency of the road particles to repel the oil, and thereby depositing the oil upon each particle of



the roadway. The chemical suspension of the oil in a body of air and the forcible discharge of the oil in an atomized or broken up state directly downward onto the road surface and into the same, carrying with it the necessary air, are the essentials of Mr. Ward's discovery.

Mr. Ward introduced this process. It was first used in road building in Los Angeles county. After its use the specifications for road building were changed. The amount of oil required was cut down to less than one-half that theretofore required.

The defendant company was one of the first to use the Ward process and the road made thereby was the cause of this revolution in road making and in the use of oil in making roads. This is proven not alone by Mr. Ward's testimony but by the testimony of George A. Rogers, the treasurer and general manager of the defendant. [Transcript pages 30 and 31.] On cross-examination Mr. Rogers says that the Ward machine was the first pressure machine he ever used; that it was on the Valley boulevard in Los Angeles county; that the use of this Ward machine "was the cause of the adoption of that class of work in Los Angeles county"; that defendant continued to use this Ward machine from 1910 to 1912, "when somebody stole it."

The Ward process has come into general use. Its use has been licensed in New York, North Carolina, Texas, Oregon, British Columbia, California, etc. The testimony of Mr. Rogers, general manager of defendant, is the forcible tribute to Mr. Ward's genius,—to the value of Mr. Ward's discovery. "*Every one*

*changed to pressure machines,"* says Mr. Rogers. This was by reason of Mr. Rogers' demonstration of the Ward process on the Valley boulevard in 1910.

The evidence shows that after using for approximately three years the Ward machine the defendant corporation equipped itself with other machines for making roadways by this process, such machines being manufactured in the East and being known as the "Monarch" machine. These machines were provided with a pump for discharging the oil under pressure and with atomizing nozzles. These nozzles were arranged in a row or series in staggered relation so that the film or sheet of broken oil from one nozzle overlapped that from another but did not project thereinto, the nozzles being arranged alternately in front or behind the next adjacent nozzles. These nozzles were provided with lips so that as the oil was forced into them and passed through them it was forced against these lips and through a narrow slot, this slot being about one-eighth of an inch wide and about seven-eighths of an inch long. The oil in these machines was heated. In many cases a temperature of about 300° was secured. This temperature was varied in accordance with the gravity of the oil used. In all essentials the defendant's machine was like the Ward machine. In fact, the only claimed difference is in the nozzles, and as to this there is practically no difference. It is the undisputed testimony that the oil was delivered from both the Ward and Monarch machines in a fan-shaped sheet. With the Monarch or defendant's machines this oil delivery was less than one-

eighth of an inch wide or thick and less than one inch long at the discharge slot of the nozzle. The testimony of the witnesses varies slightly as to the height at which the nozzles of the defendant's machines were kept when applying the oil. Some of the witnesses say that the defendant's nozzles were arranged from six to eight inches above the surface of the roadway,—others say eight to twelve inches above the roadway. All of the witnesses, however, agree that the film or sheet of oil delivered from the nozzles of defendant's machine was very thin. The best expression that they could give for this was "as thin as a sheet of paper." It can be readily understood that this was true, for all of the witnesses agree that after the oil issued through this slot less than one-eighth of an inch wide and less than one inch long, it can be expanded in an inverted fan-shaped film or sheet until such film or sheet was from six to twelve inches in length (crosswise of the road and in the direction of the length of the slot in the nozzle). It is obvious that if this oil expanded to this width the thickness of the sheet or stream must either have become extremely thin or the sheet must have become broken up or divided into particles.

Defendant's witness E. B. Gilmore [Transcript page 43] says that the appearance of the film of oil was just like a spray of water and that the atoms of the oil were spread out. This testimony agrees with the necessary mechanical facts which are capable of demonstration by any application of one of these nozzles to a garden hose. It is obvious that the further the

atomizing nozzle is from the surface of the ground the more broken up the atoms or thin sheet of water or oil will be when it strikes the ground.

As said by defendant's witness E. F. Godso, the assistant chief engineer of the Los Angeles county highways, when a light coat of oil is used the sheet or film is "almost transparent." It is a well-known fact that if you expand either water or oil to many times its volume it must either change its character or become separated into particles. It is not pretended that with defendant's nozzles there is any change in character, and it follows, therefore, that there must be more or less atomization.

Prof. Bailey says that he inspected the use of the defendant's machine on the Harbor boulevard in Los Angeles county Feb. 17, 1913, and observed that the oil came out of the nozzles in a thin triangular sheet or film; that by looking at it you get the same idea of it on the eyes as you do from the photograph [Complainant's Exhibit #2, Transcript page 59]. He states that the oil expanded out and broke into a spray; that this is the very object of the slot in the nozzle. Prof. Bailey says that he has examined Mr. Ward's machine in operation probably half a dozen times, and particularly to see the operation of the nozzles and the appearance of the oil; that from Mr. Ward's machine the oil issued from the nozzles in a fan-shaped form and formed a very thin film that was transparent. In comparing the two machines and the processes outlined thereby, Prof. Bailey says [Transcript page 22]:

"They were the same and the effect was the same;



they gave the same fan-shaped film and were forced down under pressure and produced the same effect on the road."

Mr. Ward testifies [Transcript page 15] that "with the defendant's machine the pressure forces the oil out in a fan-shaped spray directly downward; this spray is very thin; it is broken up and you can see through it in many places; it immediately covers every particle of the road surface and the pressure behind it shoots it into the voids at interstices of the road surface so that every particle is immediately covered. As the apparatus moves forward the air comes right up against this sheet; the fan-shaped sprays or sheets of oil draw the air down and intermingle the oil and air, causing the oil to oxidize much quicker and harden much quicker." Mr. Ward says on cross-examination that in observing the defendant's machine he particularly noticed that the oil came out in a thin fan-shaped sheet or film broken by pressure; it broke very close to the ground, possibly some of the sheets would break two or three inches from the ground and some of them would be closer to the ground; it separated into atoms and broke into small or big or large. Mr. Ward particularly says that the oil as discharged from defendant's machine did not separate into strings or streams of oil [Transcript page 18]. This is not denied. There is no witness who has testified that the defendant's machine delivered the oil on to the roadway *in a stream*. The testimony of Prof. Bailey and of Mr. Ward rings true when the mechanical factors are con-

sidered. The expansion of a body of oil one-eighth of an inch wide and less than one inch long to a sheet or film six inches long would render it impossible for such sheet to remain a solid sheet or stream of any thickness whatever. This expansion is six times its length, and if decreased in thickness or width to correspond would make the sheet less than one-forty-eighth of an inch. This would be an impossible condition and remain as a solid sheet. The testimony of defendant's witness, Mr. Gilmore, that the oil atoms spread out must therefore be correct.

It is shown in the evidence that with Mr. Ward's machine he uses about twenty pounds pressure upon the oil to force it through the atomizing nozzles. Defendants use about twenty-five to thirty pounds pressure with their machine [testimony of George A. Rogers, Transcript page 30]. Mr. Rogers says that defendants' nozzles are arranged six or eight inches above the ground. Whether there is an atomization or breaking up of the oil into particles with defendants' apparatus, therefore, can be demonstrated to a mathematical certainty. It is a well-known general fact that if a liquid is discharged under pressure from a small orifice, as soon as the retaining pressure of the conduit through which it has been passed by such force or pressure is removed, the liquid expands and breaks up. It no longer remains solid. This is what is meant by "atomization" in the sense of the Ward invention. With defendants' machine each of these atoms is surrounded by air. Whether surrounded by air to the

same degree as though the atomizing nozzles were raised ten, twelve or fourteen inches from the ground is immaterial. It is clear that no substantial change has been made by defendant in its later apparatus from the process as used by it in the machine furnished to it by Mr. Ward. Defendant secures its economy of oil through the process discovered by Mr. Ward and by him demonstrated to the defendant. It follows, therefore, that infringement is proven.

It is clear that the Hatfield experiment was abandoned and that it falls in that class of abandoned experiments which do not anticipate. *Parker v. Stebler*, 177 Fed. 210. The Hatfield machine was tried out once. The witnesses say that it was not satisfactory or successful. The work then under way was finished by other means and by the old drip process. Nothing more was ever heard of the Hatfield machine.

The proof in regard to the Tomer machine or process fails to measure up to the requirements called for by the law. No documentary evidence of any kind was submitted nor were any physical exhibits produced from which the court could ascertain to a certainty that the Tomer device was constructed to utilize the method or process of the patent in suit. The lower court was correct in paying no attention whatever to these two defenses.

In conclusion, therefore, appellant submits that it is clearly shown that the defendant, without the license of appellant, has used the process of appellant's patent

and particularly as set forth in claim 1 thereof. Defendant's machine or apparatus certainly divides up or atomizes the oil in contact with the air. The expansion of the sheet of oil from less than one inch long and less than one-eighth of an inch thick or wide to a film six to eight inches long or greater necessitates the breaking up or dividing up of the oil into particles or minute atoms. As the machine is moving along and the oil is thus forcibly driven down through the air, the air is thoroughly commingled therewith and the oil tends to remain suspended in such envelope of air for an appreciable time. It is not disputed that the atomized oil from the defendant's machine is brought into contact with a porous road surface, or that it is caused to permeate between the porous road surface or caused to be deposited on the material of the road surface. The manner of discharge under pressure and forcible contact of the commingled air and oil with the road surface insures such material (to-wit, the air and oil while in such agitated state or so "partly suspended"), insures or causes the atomized oil to be deposited on and between the particles of the road surface in identically the same manner as illustrated in Fig. 2 of the patent in suit.

Respectfully submitted,

FREDERICK S. LYON,

*Solicitor for Appellant.*



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No. 2775.

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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Joseph E. Ward,

*Appellant,*

*vs.*

Rogers Brothers Company, a corporation,

*Appellee.*

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**BRIEF OF APPELLEE.**

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HARTLEY SHAW,

*Solicitor for Appellee.*



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**BRIEF OF APPELLEE.**

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**STATEMENT OF THE CASE.**

This is a suit in equity brought by appellant, Joseph E. Ward, to enjoin the defendant, Rogers Brothers Company, from infringing a patent issued to Ward, the plaintiff, for a process of oiling roads and for an accounting of the profits made by the defendant by the use of this process. The defendant in its answer sets up two defenses; first, that it is not infringing the patent in question, and second, that said patent is void by reason of anticipation. Under the latter heading two prior uses of the process were set up, one by Ellis Tomer and the other by C. W. Hatfield. From

examination of the record filed in this court it would appear that the defense of anticipation was not properly pleaded for lack of any dates of use and residences of the users, and that the use by Hatfield was not mentioned in the answer at all. But in fact the defendant filed an amended answer in which both of these anticipations were properly pleaded. For some reason this amended answer is not in the printed record, but only the original and superseded answer has been inserted therein. On this matter being called to the attention of counsel for appellant, he suggested that it be mentioned in this brief and stated that he would concede that these defenses were properly pleaded.

The patent in suit was issued to Joseph E. Ward May 2nd, 1911, on an application filed March 14th, 1910, and the anticipation by Tomer is pleaded to have occurred in March, 1908, and that of Hatfield in 1903. Plaintiff made no effort to carry his invention back beyond the date of either of these uses, and hence if either of them is sufficiently established by the evidence, there can be no question that his patent is void.

The evidence in the case covered the subject of prior state of art and also the defenses of non-infringement and prior use. There was no attempt to show any profits made by the defendant. As I view it, the evidence shows clearly that defendant is not infringing plaintiff's patent and also that plaintiff's alleged invention was anticipated by Tomer. I prefer to discuss the evidence in detail in connection with the several points made, which are as follows:



## POINTS.

### I.

**The Scope of a Patent is Strictly Limited by the Claims.  
Nothing Can be Regarded as an Infringement Which  
Does Not Fall Within the Meaning of the Terms  
Used Therein.**

The above proposition is so well established that little time need be spent thereon. The following authorities support it:

- 1 Hopkins on Patents, pp. 188, 196;
- McClain v. Ortmyer, 141 U. S. 419, 423;
- Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 278;
- Coupe v. Royer, 155 U. S. 565, 576;
- Wright v. Yuengling, 155 U. S. 47, 52;
- Paper Bag Patent Case, 210 U. S. 418, 419;
- Loraine Development Co. v. General Elec. Co., 198 Fed. 100, 106;
- Evans v. Hall Printing Press Co., 223 Fed. 541;
- American etc. Co. v. Coe Mfg. Co., 212 Fed. 720.

In McClain v. Ortmyer, *supra*, the court said:

“While the patentee may have been unfortunate in the language he has chosen to express his actual invention, and may have been entitled to a broader claim, we are not at liberty, without running counter to the entire current of authority in this court, to construe such claims to include more than their language fairly imports.” P. 423.

“If the language of the specification and claim shows clearly what he desired to secure as a mo-

nopoly, nothing can be held to be an infringement which does not fall within the terms the patentee has himself chosen to express his invention." P. 425.

In *Coupe v. Royer, supra*, a patent in which the claim was for a machine in a vertical position was held not infringed by the use of a similar device in a horizontal position.

In *Wright v. Yuengling, supra*, the omission of a single part of a machine which was declared by the claim to be essential was held sufficient to avoid the charge of infringement.

In *Loraine Development Co. v. General Elec. Co., supra*, the rule was applied, although it was conceded that the defendant was within the spirit of the invention.

In the case of *American etc. Co. v. Coe Mfg. Co., supra*, it was held that a claim for a machine which required a certain movement to be made automatically, was not infringed by a similar machine in which this same movement was made by the operator.

## II.

### **The Scope of a Patent May be Further Limited by Reference to the Specification of the Patent, Including Both Description and Drawings.**

1 Hopkins on Patents, p. 197;

McClain v. Ortmyer, 141 U. S. 419, 424;

Snow v. Lakeshore etc. R. Co., 121 U. S. 617, 629;

Van Ness v. Layne, 213 Fed. 804, 808.

In the case of McClain v. Ortmyer, *supra*, the court said:

“The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it.”

In Snow v. Lakeshore etc. R. Co., *supra*, the rule was applied and the language of the claim was limited by reference to the specification and drawings.

In Van Ness v. Layne, *supra*, the claim was limited by reference to the specification so as to enable the court to uphold the patent, the claim being so broad in its language that if not so limited it would be void.

### III.

#### **The Omission of Any Step of a Process as Patented Defeats the Charge of Infringement Even Though that Step be Not Essential to the Success of the Invention.**

A process is in principle, so far as this point is concerned, essentially the same as a mechanical combination. The rule as to a combination patent is that the claim of a combination is not infringed if any of the material parts of the combination are omitted, and the courts cannot declare anything claimed by the patentee as a part of his combination to be immaterial.

1 Hopkins on Patents, pp. 337, 342;

Water Meter Co. v. Desper, 101 U. S. 332, 335, 337;

Fay v. Cordesman, 109 U. S. 408, 420;

Wright v. Yuengling, 155 U. S. 47, 52;

Hubbell v. U. S., 179 U. S. 77, 82;  
Lorraine Development Co. v. General Elec. Co.,  
198 Fed. 100, 113;  
Hall etc. Co. v. Teabout, 215 Fed. 109;  
Evans v. Hall Printing Press Co., 223 Fed. 539,  
541.

In Hubbell v. U. S., *supra*, it was held to be immaterial that two devices produce the same result, if they are not alike.

In Fay v. Cordesman, *supra*, the court said:

“If it be a claim to a combination and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality.”

In Wright v. Yuengling, *supra*, the court said:

“Now while this semi-circular connecting piece may be an immaterial feature of the Wright invention and the purpose for which it is employed accomplished, though less perfectly, by the extension of the guiding cylinder in the manner indicated in defendant’s device, yet the patentee having described it in the specification and declared it to be an essential feature of his invention and having made it an element of these two claims, is not now at liberty to say that it is immaterial, or that a device which dispenses with it is an infringement, though it accomplish the same purpose in perhaps an equally effective manner.”



The same rule has been expressly applied to a process patent.

1 Hopkins on Patents, p. 352;

Goodyear etc. Co. v. Davis, 102 U. S. 222, 230;

Royer v. Coupe, 146 U. S. 524, 530, 532;

U. S. Glass Co. v. Atlas Glass Co., 90 Fed. 724.

In Goodyear etc. Co. v. Davis, *supra*, the court said:

“The same result may be reached by different processes, each of them patentable, and one process is not infringed by the use of any number of its stages less than all of them.”

#### IV.

##### **Construction of the Patent in Suit.**

Bearing in mind the foregoing legal principles, let us examine the patent in suit to determine its proper construction. It is set forth at pages 52 to 58 of the printed record. It contains two claims which may each be analyzed into several steps or elements.

The first claim calls for the following steps in the process:

- 1st. Atomizing oil in contact with air;
- 2nd. In such manner that the oil tends to remain suspended in the air for an appreciable time;
- 3rd. Bringing the atomized oil and air into contact with a porous road surface;
- 4th. Causing the oil to penetrate the road surface while still in the atomized condition;
- 5th. Causing atomized oil to be deposited on the material of the road surface while such material is agitated and partly suspended.

The second claim calls for the following steps:

- 1st. Atomizing oil in contact with air;
- 2nd. Maintaining the oil in atomized condition and suspended in the air an appreciable time;
- 3rd. Bringing this oil in contact with a porous road surface;
- 4th. Depositing atomized oil on the road surface in a thin layer of atomized oil particles;
- 5th. Maintaining the maximum surface of exposure of the oil to contact with air and road material for hardening the oil and binding it to the road material by oxidation.

(a) THE PATENT REQUIRES AS AN ESSENTIAL STEP IN THE PROCESS OF OILING A ROAD THAT THE OIL BE ATOMIZED OR REDUCED TO A MIST AND APPLIED TO THE ROAD SURFACE IN THAT CONDITION.

The difference between the two claims above mentioned is very little and of no moment to the consideration of this point. They both require as essential parts of the process that the oil be atomized in contact with air, and that it be applied in this atomized condition to a porous road surface. These provisions of the claims are of themselves entirely clear. There is no occasion to pare them down by construction or by any expert evidence as to what the patent means. Under the authorities already cited the things so specified by the patent cannot be ignored or held by the courts to be immaterial.

The word "atomize" has been thus defined by lexicographers:

“To reduce to atoms or to fine spray.” Webster’s Dictionary.

“To reduce to atoms or atom like particles; pulverize; spray.” Standard Dictionary.

But in this case it is not really necessary to resort to such authorities, for plaintiff has himself furnished us a definition of the word in his patent, where he says:

“The oil is forced by the pump 8 through the atomizing nozzles under sufficient pressure to insure atomization, and the openings for the atomizing nozzles are sufficiently contracted to insure that as the oil issues under such pressure it will on encountering the air be broken up into such fine particles that it tends to remain suspended in the air for an appreciable length of time forming a mist or mixture of air and minute particles of oil. This operation of finely dividing the oil to form a mixture with air is well understood under the term ‘atomization’ and the function of the operation in my process is to render the oil capable of permeation or diffusion into and between the solid particles and surface of the roadway, the mixture of air and atomized oil having in this respect the properties of a gas as distinct from those of a liquid or solid.” [Tr. p. 57, lines 23-43.]

This passage and others to be quoted from the specification makes certain what is meant in the claims by the word “atomize,” if any doubt could exist as to the meaning as to the word itself. The inventor intended that there should be a cloud or mist of oil produced in carrying out his process. Oil was not to be applied to

the road surface in an unbroken stream or sheet, but in a finely divided condition so that it would surround and coat each particle of the road surface and go into and through the pores thereof for that purpose.

Not only is it clear from the patent itself that it does not cover the application of oil in a sheet or film, but it appears from the evidence that in view of the prior state of the art, a patent covering such manner of application could not have been obtained. Evidence on this subject may always be introduced in a patent case without any pleading in regard thereto.

Brown v. Piper, 91 U. S. 37, 41.

A patent will be so construed with reference to the prior state of the art as not to include anything disclosed by prior patents or devices previously in public use or known to the public.

9 Encyc. of U. S. Sup. Ct. Rep. 224;

Hubbell v. U. S., 179 U. S. 77, 80.

The evidence shows that in 1900, and for several years thereafter, a device known as the Studebaker sprinkler was in common use for applying oil to roads. This was the same device used for water sprinkling, and discharged the oil by the pressure of gravity from the tank in which it was carried. It consisted of a cylindrical head connected with the oil supply. In this head was a transverse slot, the width of which could be reduced so as to regulate the quantity of oil supplied. This slot was carried about two feet above the ground and discharged the oil in a fan-shaped sheet which spread out until it hit the ground. If the air



was calm the oil sheet would hit the ground without a break, but if wind was blowing it would break up before reaching the ground. [See testimony of Burns, Tr. p. 25; Doran, pp. 38, 39; Brawner, p. 40.]

About the same time another machine was constructed and used by which the oil was discharged on the road through a series of pipes, which were flattened at the ends so as to discharge the oil in a fan shape. [Doran, Tr. p. 38.]

Another machine used about 1906 or 1907 discharged the oil from a pipe into a pan so that it ran off the edge of the pan and fell on the road in a thin sheet. Still another machine used about the same time discharged the oil from several pipes on a board and allowed it to run over the edge of the board in a solid sheet, and so fall to the road. [Joyner, Tr. p. 32.]

All of these machines were alike in one respect, namely, they discharged the oil upon the road in the form of a thin sheet. In this respect, as will appear later, they resemble defendant's machine. Especial attention is called to them here because the plaintiff, Ward, seems to claim in his testimony that the air coming in contact with the fan-shaped sheet of oil on defendant's machine as it moves forward, becomes mixed with the oil and thus in effect atomizes it. [Tr. pp. 15, 16.] The same claim was made by plaintiff's expert, Bailey. [Tr. p. 21.]

Of course the air would have the same operation on these films or sheets of oil which were discharged by the above mentioned machines in use long before the plaintiff's invention, as it would on the sheet of oil

discharged by the defendant's machine, except that the pressure being less in the former machines the oil would not be forced to the ground with so much velocity, and hence there would be more time for the full effect of the air to be obtained. Hence if this were the kind of atomization meant by the patent, it would be void for lack of novelty. The court is therefore required to give it the construction which its own language sets forth in order to give it life as against these earlier processes; and so doing to limit the atomization to that which produces a cloud or mist of oil.

(b) THE PATENT REQUIRES THAT THE ATOMIZED OIL BE SUSPENDED IN THE AIR.

The second claim requires that this be done for an appreciable time, and the first claim requires that an effort be made to accomplish the same thing.

At the trial, plaintiff and his expert Bailey propounded a theory regarding the meaning of the term "suspended in the air," which is certainly novel and illustrates the length to which alleged experts will often go in attempting to bolster up a case in support of which they are hired. They claimed, in substance, that "suspended in the air" is equivalent to "surrounded by air," regardless of the velocity of the oil toward the ground. As the plaintiff said, if you drop a brick from your hand the brick would be suspended in the air [Tr. p. 19]; a statement which to the ordinary man would indicate that some miracle had been performed. Bailey adhered to the same theory, saying that a cannon ball or bullet moving in the air would

be suspended therein. Were it not that the same point is made in appellant's brief, further comment would seem superfluous. In the brief it is claimed that what the patent really calls for is a "chemical suspension" of oil in air, by which it is meant that there is air around the oil, and that this may exist although the oil is forcibly projected down against the road. But this phrase used by appellant involves a contradiction. There is no such thing as a chemical suspension. Suspension does not involve any change in the identity of the material, and hence is a physical as distinguished from a chemical process.

Again the dictionary may be consulted with profit, for even the patentee of an invention is not at liberty to alter the meaning of language in order to maintain his suit.

*"Suspend:* To sustain in the body of a fluid, as fine particles or a body of nearly the same specific gravity; as, fine dust suspended in the air." Standard Dictionary.

*"Suspend:* To attach to something above; to cause to depend; to hang; as, to suspend a ball by a thread; hence to hold, support, or sustain as if by hanging; as, dust suspended in the air; oars suspended over the water." Webster's Dictionary.

Definitions having no relation to this subject are omitted in each case.

The plaintiff has also in his patent furnished us with several illustrations of the meaning of the expression "suspended in air," which are quite at variance with the flight of fancy he attempted as a witness. Thus he says in the patent:

“The process consists essentially in applying the oil to the road surface in a condition of suspension in the air in such manner that the oil *as it settles into contact* with the road surface permeates the road surface by reason of its fine state of division.” [Tr. p. 56, lines 50, 55.]

“By reducing the oil to an atomized condition and suspending it in the air it is caused to enter the porous surface of the roadway and to penetrate between the dust particles by a process of diffusion; and when it is deposited upon such surface or particles it is in the final condition of distribution desired and does not require further mechanical stirring or pressure except to compact the particles together.” [Tr. p. 57, lines 54, 64.]

“When the oil is suspended in the air in atomized condition, it will part with the greater portion of its most volatile constituents and lessen the time of evaporation after the oil is deposited on the particles of the road surface.” [Tr. p. 57, lines 87, 93.]

“It will on encountering the air be broken up into such fine particles that it tends to remain suspended in the air for an appreciable length of time *forming a mist* or mixture of air and minute particles of oil.” [Tr. p. 57, lines 27-33.] (Italics are mine.)

Appellant further claims in his brief that the patent requires the oil to be applied to the road surface in a condition of suspension in the air and that therefore “suspension” as used in the patent must have some extraordinary meaning, but this is not necessary. The



oil being in suspension in the air “settles into contact with the road surface,” as the patent expresses it, just as a fog or mist of water would do. It remains suspended in the air until it actually reaches its resting place on the road surface. The patent nowhere speaks of it as being suspended after this time; instead, it uses the phrase “exposure to the air” as expressing the situation, whenever there is occasion to mention it, both in the specification [Tr. p. 57, lines 83, 95-98] and in the second claim. [Tr. p. 58, line 18.] The third quotation above made from the patent clearly indicates that the period of suspension in the air occurs before the oil is deposited on the road.

Appellant’s construction of the phrase “suspended in the air,” besides doing violence to the meaning of the language, also ignores the effect of the words “for an appreciable time,” which are found in the specification [Tr. p. 57, line 30] and in both claims. [Tr. p. 58, lines 2 to 13.] In his brief he says that “Mr. Ward’s conception was to force the oil against and into the particles of the road surface” (p. 9) and that “the forcible discharge of the oil in an atomized or broken up state directly downward on to the road surface and into the same” is an essential part of Ward’s discovery (p. 15). If Ward had any such conception or made any such discovery, he signally failed to disclose it in his patent. Appellant’s brief does not explain how the oil can be maintained suspended in the air an appreciable time and yet forced against and into the road. Neither does it inform us why, if Ward’s conception was as stated, he only made claim in his patent for

“bringing the oil into contact with” the road, and causing the oil “to be deposited on” the road. It is very clear that when Ward’s patent was issued he had no such conception as is now claimed for him; but having since found that the atomization and fog process which he claimed is of no practical value, he is now trying to stretch his patent to cover something else, to-wit, the application to the oil of pressure or force in addition to that of gravity.

(c) APPLICATION OF OIL BY PRESSURE IS NOT COVERED BY PLAINTIFF’S PATENT.

The application of oil by pressure or by forcibly projecting it down against the road is not covered by this patent. Plaintiff claimed in his testimony [Tr. pp. 15, 17], as well as now in his brief, that it is so covered; but pressure is not mentioned in either of the claims, which necessarily limit the scope of the patent according to the authorities heretofore cited. In the specification the only reference to pressure is that it shall be sufficient to insure atomization. [Tr. p. 57, line 24.] Anything more than this would, of course, defeat the requirements of the claims that the oil remain, or tend to remain, suspended in the air an appreciable time; and also the statement in the specification that the process consists “essentially” in applying the oil so that it will “settle” into contact with the road. [Tr. p. 56, lines 50-54.] And Fig. 1 of the drawings attached to the patent [Tr. p. 55] shows a spray of oil projected in a horizontal direction, which precludes the idea that the oil was to strike the road forcibly.

Fig. 2, to which appellant refers in support of his argument in this matter, is merely a rear elevation of the oil sprays, and it does not show whether the oil is being projected in a horizontal or vertical direction, nor whether it is being forced downward or is merely settling downward from its own weight.

In any case, there would be nothing novel about applying the oil by pressure. Pressure has been used as a means of applying all sorts of liquids to all sorts of purposes for so long a period that no invention could be involved in using it to apply oil to a road. Moreover, pressure has been used in applying oil to roads long before Ward's invention. All of the older machines described in the testimony operated by pressure. This pressure was, it is true, due to gravity, but the source of the pressure cannot affect the fact that pressure was used to force the oil through the slots in those machines. With a full tank, no doubt, the pressure was considerable and it forced the oil out in a thin sheet, but the trouble with those machines was that the pressure became less as the tank emptied, and hence they did not give a uniform application of oil. The application of oil under the pressure of a pump remedies this defect, because the pressure can be kept uniform and the application of oil to the road made uniform. [See testimony of Burns, Tr. p. 25; Rogers, Tr. p. 30.] This is all the virtue there is in the process appellant now claims and it is not covered by the patent and could not be.

The court will dismiss a bill when satisfied that invention does not exist, after the prior state of the art

has been shown upon the trial, even if want of invention has not been pleaded.

1 Hopkins on Patents, p. 416.

A patent may be declared void for want of novelty, though no such defense was set up in the answer.

Dunbar v. Myers, 98 U. S. 187;

Richards v. Chase Elec. Co., 158 U. S. 301.

To apply an old process to old materials is not invention, nor is the resulting product an invention.

1 Hopkins on Patents, pp. 229, 234;

King v. Gallum, 109 U. S. 99;

Leggett v. Standard Oil Co., 149 U. S. 287, 295.

The application of an old process to a new subject for the purpose of producing the same result, is not the exercise of the inventive faculty.

Brown v. Piper, 91 U. S. 37, 41.

Hence if appellant's patent is now to rest upon the proposition that his discovery was the application of oil under pressure, it must be declared void.

(d) A POROUS ROAD SURFACE IS REQUIRED BY APPELLANT'S PATENT.

This is required by both claims and was considered by plaintiff important when he applied for his patent. By means of this porous surface he proposed to accomplish the object of mixing the oil with the material of the road. The oil in a finely divided or atomized condition was to settle down on this surface and permeate its porosities and penetrate between its particles



by reason of the fine state of division of the oil, thereby both mixing the oil with the road material and preventing the formation of pools, etc. [See specification, Tr. p. 56, lines 25-30, 50-55; p. 57, lines 55-60.] If the surface of the road were composed of hard or solid material, neither of these results could be produced, and the process would not be successful. The first statement contained in the specification is that plaintiff has invented a process for making roadways by applying oil to sand, gravel or earth. This shows what he meant by a porous road surface.

Another step in the first claim, upon which claim appellant now seems to rest his case in his brief, is "the atomized oil to be deposited on the material of the road surface while said material is agitated and partly suspended." [Tr. p. 58, lines 5-10.] Appellant claims in his brief that this clause of the patent means that the oil is to be agitated and partly suspended, but the language of the patent, which has just been quoted, will not fairly bear such construction. The word "material" is twice used. The first time it is the material of the road surface, and the second time, just a few words later, it is referred to as "said material." This cannot mean anything else than the material which has just been described, namely, that of the road surface. Practically the same phrase, "material of the roadway," is used in claim two, and "road material" is spoken of in one or two other places as distinguished from the oil to be applied thereto. The word "material" is nowhere in the patent applied to the oil. This provision of the patent is a further ex-

tension of the idea of porosity of the road surface, and requires a road covered with a layer of loose or dusty material which will be easily stirred up by the action of the oil in dropping on it. This step of the process is clearly called for by the claim and must be regarded as a material part of it. It tends further to show, what is clearly evident from a reading of the whole specification, that the plaintiff, when he made his application for patent, had in mind only the use of oil on dusty roads for the purpose of laying the dust and making a compact surface therefrom. As the patent says, "The process is specially applicable in connection with a roadway whereon there is a considerable deposit of dust" [Tr. p. 56, lines 42-44], and the process "leaves on the roadway a deposit of oil substantially covering each and every particle of dust and extending appreciably into the loose or porous dust on the surface of the roadway." [Tr. p. 57, lines 65-69.]

(e) THE UTILITY AND USE OF THE PROCESS.

Appellant claims in his brief that the discovery of the Ward process has resulted in a great saving in the amount of oil used in making a road, amounting to at least one-half thereof, and that this fact is undisputed. In this he is mistaken. The fact is not proven in this case at all and hence there was no reason to dispute it. The only witness who gave testimony approaching this subject was the plaintiff himself, who merely said that before his process was introduced a certain amount of oil was generally used in road building, and afterwards a certain smaller

amount has been used. He did not say that this difference was due to the use of his process. It may have been due to a dozen other things. As a matter of fact it was due to the practical abandonment of the use of oiled dirt roads and the increasing use of macadam, and to the discovery by engineers that in rock macadam they had been using too much oil to produce a stable road. The reasons just mentioned are of course not in evidence, but there is nothing in plaintiff's evidence to exclude them or any other reasons. One of the first things a student of logic learns is that the argument *post hoc ergo propter hoc* is fallacious; but it is the very argument made for appellant on this point. The court was quite justified in ignoring this testimony of plaintiff and giving no weight to the alleged saving in oil. It is also stated in the brief that the plaintiff's testimony on this matter is corroborated, but I have been unable to find that any other witness so much as mentioned it. In this connection the brief also states that defendant sometimes uses as little as one-eighth of a gallon of oil per square yard, and refers to the testimony of George S. Benson as proving that fact. This indicates an entire misapprehension of his testimony. He was merely describing the appearance of the Monarch machine when applying that quantity of oil, but he did not say who had made such an application or that it was ever done in actual road building work.

As to the practical use of Ward's process, the evidence indicates that it is not much regarded. Appellant seeks to draw from Rogers' statement that after

the use of Ward's first pressure machine every one changed to pressure machines, an inference that this change was a tribute to Ward's inventive genius. But Rogers did not say the operation of Ward's machine was the sole cause of the change. He said that and the fact that a half dozen machines came out in the east and were being extensively advertised and put on the market brought about the change. [Tr. p. 31.] Rogers also said that while engineers did specify pressure machines, he never knew or heard of one specifying the use of an atomizing process, which is the main and essential feature of Ward's process. [Tr. p. 30.] The necessary inference from this is that what appealed to engineers about Ward's machine was not its patented process of operation, but the fact that by it the pressure under which the oil was applied could be controlled and regulated. As already shown, this feature of the machine is not a part of the patented process at all, and hence the wide use of machines having such a method of operation constitutes no recognition or adoption of Ward's patent.

The licenses which the plaintiff has issued do not amount to anything as showing general recognition or adoption of his process. He makes an oiling machine, which, as already noted, was approved because of its control of the pressure, and hence came into use. With every one of these machines sold he issues a license for use of the process, without extra charge. In other words, he induces a man to buy a machine and then thrusts upon him a license for the process. [Tr. p. 14.] These licenses constitute the bulk of the licenses



issued by him, and are all to users in California. In addition to them he has issued one general license to use the process in California, for which he got \$800.00, and an unstated number of licenses in Oregon, British Columbia and Washington, for which altogether he got \$1500.00. In all the rest of the United States he has issued no licenses whatever. [Tr. p. 16.] In appellant's brief it is stated that the process has also been licensed in New York, North Carolina and Texas, but this is in error. Plaintiff merely said that *he* had built roads by the process in those states [Tr. p. 14] by which he probably meant roads built for demonstration purposes in the effort to introduce his process. Thus in four and one-half years from the date of the patent to the trial, plaintiff collected the munificent sum of \$2300.00 from licenses, and succeeded in getting some users in only three of the United States and one foreign province to try his process. Considering the tremendous amount of road building that has been done in that time, even in California alone, where the state has spent nearly eighteen millions for roads, and the counties and cities many millions more, this is a trifling showing indeed.

As to these licenses, Los Angeles county has licenses for the use of two machines only, the parts of which the county bought from plaintiff, but it is using other machines which are not licensed. [Tr. pp. 16, 17, plaintiff's testimony.] These unlicensed machines are like that of defendant. [Joyner, Tr. p. 32.] Plaintiff wanted to give the county a license to use these machines but the county refused to accept it. [Joyner,

Tr. p. 33.] The state of California has licenses for only two machines, which of course cannot do a large percentage of its work in view of its eighteen million bond issue for good roads.

It is, of course, not proved that the machines which plaintiff sells do in fact operate by his process. Brawner, who had seen one of the machines operated, said that it did not atomize the oil, and he had never seen a machine that did. [Tr. pp. 41, 42.] But if they did use the process many of them have gone out of use. The city of Los Angeles discarded one because it scattered oil around too much through the air. [Higley, Tr. p. 35.] Benson owns one which he had not used for two or three years. [Tr. p. 45.]

V.

**The Defendant is Not Infringing the Plaintiff's Patent.**

The question next arising is whether the defendant's process of road oiling is an infringement of plaintiff's patent, properly construed. The trial court found that it was not. The evidence on the subject, viewing it in the light most favorable for appellant, is conflicting, and was taken in the presence of the trial court. Under these circumstances the trial judge's finding is presumptively correct, and unless an obvious error has occurred in the application of the law, or a serious mistake has been made in the consideration of the evidence, such finding will not be disturbed on appeal.

Thorndyke v. Alaska etc. Co., 164 Fed. 657, 665;

Harper v. Taylor, 193 Fed. 944, 946;

De Laval etc. Co. v. Iowa etc. Co., 194 Fed.  
423;

U. S. v. Marshall, 210 Fed. 595.

(a) THE DEFENDANT DOES NOT ATOMIZE THE OIL.

The first and most important of the elements in plaintiff's patented process is atomization. Does the defendant's machine atomize the oil? It has a row of nozzles six to eight inches above the ground, in each of which is a slot about one-eighth of an inch wide by one inch long, through which the oil is forced from a tank by the pressure of a pump, the usual pressure being twenty-five to thirty pounds. These nozzles are set so close to the ground in order to get an unbroken sheet of oil to hit the road, so the application of the oil will be uniform. [See testimony of Rogers, Tr. pp. 29, 30, 31.] The defendant produced a number of witnesses who had seen the machine work and whose testimony in brief is as follows:

George A. Rogers, general manager of defendant, says the oil is discharged in a fan-shaped sheet, practically solid, and continuing solid until it strikes the road surface; that the defendant's effort is to get a uniform application of oil of a certain quantity per square yard. [Tr. p. 29.]

Frank H. Joyner, who is road commissioner of the county of Los Angeles and had many years experience in road building, says that oil is discharged from defendant's machine in a fan-shaped stream and struck the road in a solid sheet, or practically a solid sheet; that it comes out and gets thinner as it approaches the earth, and when working satisfactorily strikes the road in a solid sheet. That the oil between leaving the machine and hitting the ground did not have **any** finely

divided particles or cloud or mist around it, and did not appear to be atomizing the oil or to maintain any of the oil suspended in the air that he could see; that there is always some cloud or mist of oil or smoke or steam that arises in back of those machines when they are running; it might be finely divided oil and the cause of it is that when the hot oil comes out in the air and strikes down on the cold stone of the road a sort of steam or fog will come up. The oil does not divide into fine particles until it strikes the road, but frequently the road is watered and there you will see the steam. [Tr. p. 33.]

William Higley, who works for the city of Los Angeles as an inspector of road oiling, has seen the Monarch machine which the defendant uses, and states that with these machines the oil comes out in a steady sheet from the nozzle; when it hits the ground it is a solid sheet of oil, fan-shape like, and he has never seen any sign of oil being atomized around this machine while it was working or any cloud or mist of oil about it. [Tr. pp. 34-5.]

C. R. Brawner, who is a civil engineer and has had extensive experience in road work, testified that he has seen defendant's machine in operation and that the oil is one solid sheet until it hits the ground; that the oil comes out from the nozzle through the opening and gradually spreads out in width and cross-wise of the road, thinning the sheet as it hits the ground. If you were to take a cross-section of the sheet of oil there would be thickness to it, probably two or three-hun-



dredths of an inch and probably a foot wide. Under normal conditions of working it will almost inevitably go in a solid sheet; when the wind blows some particles would blow back a little or whip off in needle form, but not in a spray or atomized condition. [Tr. pp. 41-2.]

H. H. Fillmore, who is employed by the county of Los Angeles as resident engineer in charge of road work, has seen defendant's machine in operation and he states that the outlet was a slot and the oil was the shape of the slot and flowed out under pressure in a solid sheet. It was thicker than a sheet of paper when it struck the earth; where it struck the earth it was still a sheet of oil, about six inches wide and thicker than a sheet of paper; and that between the time it leaves the opening in the machine and the time it hits the ground, it is in a fluid state, flowing under pressure and continuous, but not divided up. [Tr. pp. 42-3.] Appellant in his brief refers to the testimony of a witness, E. B. Gilmore, but probably means this witness, H. H. Fillmore, and quotes him as saying that the appearance of the film of oil was just like a spray of water, and that the atoms of the oil were spread out. The latter statement about the atoms being "spread out" does not appear anywhere in Fillmore's testimony as far as I can discover. He did use the word "spray," saying that the appearance of the oil was just simply a spray like a spray of water or anything, only it was oil. This mere use of the word "spray," however, is of no significance as a description of the oil in view of the further detailed description which the witness gave, from

which it clearly appears that the oil does remain in a continuous sheet until it strikes the ground. He evidently used the word "spray" as a generic term for any sort of device applying liquid to the ground.

E. F. Godso, who is also employed by the county of Los Angeles, has seen defendant's machine applying oil to the road and states that the oil comes out in a solid sheet; you cannot see through it at all. The edge of the sheets from the several nozzles all meet so that it gives a solid sheet or solid continuous application as the truck proceeds, the oil striking the ground as a sheet. [Tr. pp. 44-5.] It is true the witness also says, as appellant points out, that in putting on a very light coat of oil it is *almost* transparent, and when heavy, it is opaque; but this statement that it is "almost transparent" does not detract from his further statement that it remains a solid or continuous sheet until it strikes the ground.

George S. Benson, who is a contractor and has done a good deal of road oiling, states that in defendant's machine the oil drops down in a solid sheet and seems to spread right out on the road. [Tr. p. 45.]

James H. Kew, who had been street superintendent of the city of Inglewood for some time and in charge of street oiling there, saw defendant's machine in operation on the roads at that place, and states that the oil came down in a thin V shape, an inverted V, about six inches wide where it touched the road, and was a thin sheet of oil as it got down to the road. [Tr. p. 46.]

Earl B. Gilmore, who is a contractor for road oiling, has a machine using the same type of nozzle as defendant's machine, and has also seen defendant's machine in operation and says that the oil comes out of the nozzle in a sheet of oil. It comes down in a sheet and hits the road in a fan shape, and that as it strikes the ground it is a full eighth of an inch thick. [Tr. pp. 47-8.]

Some of the above witnesses compare the operation of defendant's machine with the appearance of the machine made by plaintiff. In his brief appellant does the same and claims that the two machines are the same in effect, basing this claim largely on the testimony of his expert Bailey, who, by the way, is not an expert on road building and does not pretend to know anything about it. Comparison of these machines is of value only to the extent that the plaintiff's machine is found to apply his process, which Brawner said it did not do. It is apparent from Benson's testimony that the defendant has changed his machine since he first made it, for Benson says that two or three years ago it had a round spray [Tr. p. 45], whereas Bailey says it is now flat. But the observations made by some of the defendant's witnesses on plaintiff's machine in operation, tend at least to show what would happen if the atomizing process were put in operation. Higley said the city of Los Angeles had to stop using it because of people's complaints; that it did not get oil on the street properly; that it brought the oil out in a vapor and the air was full of oil and people complained about it sprinkling their clothes' lines [Tr. pp. 34, 35].

Rogers said that with the first Ward machine the wind affected it and he did not get the uniform application of oil, the nozzles being fifteen to eighteen inches off the ground [Tr. p. 31].

Benson said that the oil from the Ward machine came down in a kind of a mist or vapor. [Tr. p. 45.]

Kew said that in the Ward machine the sprays were eighteen inches from the ground, and about three inches from that the oil thinned out to nothing. It was all atomized by the time it got to the macadam, and if the wind was blowing hard it left streaks on the road. With defendant's machine the oil did not blow. [Tr. pp. 46, 47.]

The foregoing testimony shows clearly that if oil is atomized there will be a cloud, fog or mist of oil attending the machine, and that it will spread through the air more or less, and if the wind blows, it will quite naturally blow the oil from the place where it should strike the road and interfere with the evenness of the oiling. It also shows clearly that defendant is concerned with getting a uniform coat of oil and does not care about atomization and that defendant's machine does not atomize the oil. It applies it in a thin sheet or film, and the oil remains in that condition from the nozzle to the road, the nozzles being set low for the very purpose of insuring that there be no interference with this sheet in its course to the road. All this is shown by the testimony of witnesses who are not interested in the defendant and who have seen the machine in use and who have knowledge of road building.



In opposition to this appellant presents his own testimony and that of an alleged expert who knows nothing of road building and oiling except what he may have learned in this case. The latter claims that the oil is atomized by defendant's machine, basing this belief on theoretical grounds. He admits that it does not have that appearance, saying the oil came out of the nozzles in a thin triangular sheet or film; and a person might have considered the oil came out in an unbroken sheet or film. [Tr. p. 24.] But he claims there is an interruption in defendant's nozzle that would break up the oil. Examination of the nozzle itself, however, shows that this interruption is merely the contracting of the round channel through which the oil is flowing into the slot from which it emerges. [Defendant's Exhibit B.] Plaintiff's nozzle, on the other hand, has a very much smaller outlet and has the sharp edge interposed in the oil channel and turned so that the oil strikes directly against it. [Defendant's Exhibit A.]

Bailey admitted that all his experiments in spraying oil had been made with the Bordeaux nozzles [Tr. p. 51], which are the same as plaintiff uses in his machine [Tomer's testimony, p. 27, Exhibit A]; hence Bailey has had no experience in the operation of such a nozzle as defendant uses, and his testimony regarding it is purely theoretical.

The plaintiff himself, while claiming that the defendant's machine atomizes the oil, said that by atom he meant a large or small particle of oil, and that oil may be atomized thin or coarse; also that the oil came

out of defendant's machine in a thin fan-shape sheet or film which broke very close to the ground, some sheets two or three inches above the ground and some closer. [Tr. p. 18.] This sheet of oil was a pretty coarse atom, but that appears to be what plaintiff considered it to be. The plaintiff further testified that the oil now in general use in road making is 90 to 95 per cent asphalt, and that you cannot make a mist of such oil, but could break it up into fairly fine particles at a high temperature. This admission is sufficient to show that the patented process cannot be applied to such oil. Fairly fine particles,—in other words, drops,—are not what the patent calls for. There must be a mist of oil. These fairly fine particles which are not fine enough to make a mist would not settle down on the road and could not penetrate the road surface and enter its porosities, so as to coat every particle of the dust, etc., as required by the patent. Such being the case, defendant could not, under present road making practice, use plaintiff's process if it so desired.

*Plaintiff's witness Bailey, when called for rebuttal, said that there were three different methods of applying oil; first, a mass; second, atomizing; third, in a thin film.* [Tr. p. 50.] The plaintiff's patent, by its own terms, adopts the second method here mentioned, and the defendant, by all the testimony, uses the third method. Hence the defendant is not using the essential part of plaintiff's process and is not infringing.

Appellant suggests in his brief that because the sheet of oil after leaving the slot of defendant's machine in-

creases in width, there must be a separation of the atoms or particles of oil to produce this expansion, and hence that there is atomization of the oil. If there were, it would not be such as the patent calls for and could not perform the functions of atomization in the patented process. But this argument overlooks the fact that while the sheet of oil increases in width it decreases in thickness, as most of the witnesses said, thus permitting it to remain in a solid and unbroken sheet. Appellant also claims that the sheet could be only one forty-eighth of an inch thick, and that a sheet of such thickness is impossible, but does not show why it is impossible. One forty-eighth of an inch is a substantial thickness, greater, in fact, than the thickness of a sheet of paper, to which some of the witnesses who had actually seen the oil coming from defendant's machine compared it; and yet all of them, after seeing it, took the stand and swore that it was a solid sheet of oil. Their observation ought to be better than theoretical argument drawn from the computed thickness of the sheet of oil.

Appellant further suggests that the action of the nozzles on a stream of water would illustrate their behavior with oil. But this is not correct. Particles of water have little cohesion to each other, and hence water is easily broken up. But asphaltic oil, and especially heavy oil such as defendant has used, is sticky, and, as the plaintiff testified, cannot be broken up fine. Brawner testified to the same fact when he said that the viscosity of oil is greater than that of water, and consequently it stuck together and did not spray so

much when used in the old Studebaker machine. [Tr. p. 41.] The sprinklers in this machine, it should be noted, were two feet off the ground. [Burns, Tr. p. 25.]

In this connection it may be remarked that certain photographs of defendant's machine were put in evidence and an attempt has been made to reproduce them in the record by the halftone process, but on account of the character of this process, which produces pictures through a screen criss-crossed with lines, thereby producing a large number of small dots on the picture, the effect of the original photographs is lost. It is possible to imagine on looking at these prints that there was some spray of oil coming from the nozzles, on account of the appearance of the dots above mentioned, but the original photographs show the same solid sheet effect which was testified to by the witnesses.

(b) THE DEFENDANT DOES NOT SUSPEND THE OIL IN THE AIR.

Coming now to the matter of suspension of oil in the air an appreciable time, it is clear that defendant's machine does not produce or attempt to produce that effect. It is unnecessary to take up much space on this point, as the testimony already reviewed to the effect that the oil remains in a solid sheet until it strikes the ground shows that it cannot be suspended in the air for an appreciable, or any, time. The defendant uses a pressure of twenty-five or thirty pounds on the oil and sends it out through a slot, placed six or eight inches above the surface. Under these conditions it is forcibly shot



down to the ground and there will be not the least tendency to suspend it in the air. The time of transit across the six or eight inch interval with a force of twenty-five or thirty pounds behind it would be too short to be appreciable. Nearly all the witnesses who spoke of the matter said that the oil "hits the road" or "strikes the road"—quite different from the "settling" on the road described in the patent. Even plaintiff himself said the pressure behind the oil in defendant's machine "shoots it into the voids in the road" [Tr. p. 15], and Bailey says the oil is "forced down" by defendant's machine [Tr. p. 22].

Appellant has made the suspending of the oil an appreciable time an essential part of his patent, and as defendant's machine does not do this, defendant is not infringing.

(c) THE DEFENDANT DOES NOT USE A POROUS ROAD SURFACE.

The next essential of the patent is "a porous road surface." As already shown, the plaintiff, when he used this phrase in his patent, meant dust, or at least a surface of sand, gravel or earth. With any hard surface the mixture of atomized oil and air would not work, because the road surface could not absorb the oil. Now, to what sort of surface was the defendant applying oil? Most of the witnesses who testified as to observation of its machine did not say what sort of surface it was working on. Rogers, who took the photograph Defendant's Exhibit C [Tr. p. 61], said the machine was then applying oil to a concrete pavement.

[Tr. p. 29.] Clearly this was not of a porous character. Joyner and Kew saw the machine working on a macadam road. Plaintiff testified that when he observed defendant's machine and took pictures of it they were putting oil on a rock macadam road; that the rock had been rolled down with a roller, and he does not remember seeing any dust on it. [Tr. p. 19.] (Of course the macadam road which the other witnesses saw is, by definition of the term, a rock macadam road.)

Such a road does not answer the description of a porous road surface. When plaintiff made his invention oil was being applied to ordinary dirt roads, and frequently they were plowed and harrowed to make them more porous and absorbent of oil before it was applied. It was then necessary to cultivate or tamp the road in order to mix the oil with the dust or loose soil. It was such a road that plaintiff had in mind and described in his patent, one of his objects being to avoid the necessity of so stirring the oil into the ground, by his special process of atomization, settling, permeation, etc. But nothing of this kind occurs in a rock macadam road. Such roads are being built in such great quantities at the present time that the court can take judicial notice of the process just as the court took notice of the mode of operation of an ice cream freezer in *Brown v. Piper*, 91 U. S. 37. The process is to roll the rock down and compress it as much as possible with a heavy roller, then to apply a coat of heavy asphaltic oil to the surface, then, without mixing or attempting to mix the oil with this layer of rock, to

spread over the oil a layer of sand or fine rock. Of course rock is not porous and will not absorb oil at all, and a layer of rock which has been compressed with a heavy roller does not answer the description of a porous road surface. There may be some holes or interstices between the pieces of rock, but they do not at all perform the functions of the porosities referred to in plaintiff's patent. They do not absorb the oil or allow it to penetrate or permeate the road surface or prevent the oil from making a sticky layer of asphalt on top of the road. Reference to the photograph introduced by plaintiff [Exhibit 2, Tr. p. 59] shows that the oil is all on top of the road and that none of the results claimed by plaintiff for his process were obtained in the case photographed.

Appellant seems in his brief to rest his argument for infringement on claim 1 of the patent, and that being the case, the last step in the process there described should be noted, namely; that the material of the road surface shall be agitated and partly suspended while the oil is being applied. As already shown, this is the true construction of the patent, although appellant seeks to construe it differently. It must be regarded as a material step in the process, being expressly claimed. There can be no doubt that defendant is not making use of this part of the process. The facts just mentioned show this. Defendant, according to evidence, was oiling either concrete or rock macadam, and neither of these is or can be agitated or partly suspended; hence there has been no infringement of claim 1 of the patent.

VI.

**The Plaintiff's Patent was Anticipated by Ellis Tomer.**

Although defendant's case is clear on the subject of infringement, the defense of anticipation requires some attention. As to the Hatfield matter, it may be conceded that this was a mere experiment and does not amount to an anticipation. But the same is not true of the Tomer process. Appellant claims that on this subject the proof was not legally sufficient, especially because no documentary evidence and no physical exhibits were introduced. But the rule is that anticipation may be established by oral evidence if it is clear and satisfactory and establishes the existence of the anticipation beyond a reasonable doubt.

1 Hopkins on Patents, p. 266;

Buser v. Novelty Co., 151 Fed. 478, 482;

Grupe Drier Co. v. Geiger etc., 215 Fed. 110,  
114.

Tomer's testimony fully measures up to this rule. It is clear and satisfactory. [Tr. pp. 27, 28.] It shows that he began to use the process March 17th, 1908, nearly two years before Ward applied for his patent, and used it on a considerable scale and in a commercial way all of that year, oiling about twenty miles of streets. He used it again the next year. He used on his machine the Bordeaux nozzle, the same which plaintiff admitted he used on his first machine, a sample of which is in evidence, and the effect of which nozzle was to vaporize the oil and discharge it in a fan. He used pressure in his machines and had the nozzles about



eighteen inches off the ground, the same as in Ward's first machine, and the oil came out in a fan spray from them; when there was a wind it would blow the spray quite a ways. He applied the oil to dirt streets, and his first and main purpose was to settle the dust. Here is exactly the plaintiff's process as nearly as plaintiff himself ever succeeded in applying it. Tomer atomized the oil and it remained suspended in the air an appreciable time, at least long enough for the wind to blow it around, and it was then brought into contact with a porous road surface, and thereby a deposit of oil would be caused on each particle of road surface so as to maintain the maximum surface to air, etc., for hardening. As Tomer says, it did not take his first coat long to evaporate.

Here is the whole substance of plaintiff's invention as described by him, and it was in public use two years before he applied for a patent. He made no effort to carry his invention back beyond the date of application. There was, therefore, such an anticipation as avoids the patent.

As I said in the first place, the record does not show that this defense was properly pleaded, but no objection was made to the testimony and there was, in fact, an amended answer properly pleading it.

For all the foregoing reasons I respectfully submit that the judgment of the lower court was correct and should be affirmed.

HARTLEY SHAW,

*Solicitor for Appellee.*

















